No. 92-219

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA

Appellant,

v.

NICK THEODORE, et al.,

Appellees.

On Appeal From The United States District Court For The District Of South Carolina

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JURISDICTIONAL STATEMENT AND APPENDIX

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
101 W. Friendly Avenue
P. O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Charles E. Carpenter, Jr.
Frederick A. Crawford
Richardson, Plowden,
Grier & Howser, P.A.
1600 Marion Street
P. O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

Charles Fried
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636

Counsel for Appellant
***Counsel of Record**

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Questions Presented

After the State of South Carolina failed to redistrict its General Assembly and congressional seats following the 1990 census, a three-judge court adopted its own plans and ordered them into effect beginning with the 1992 elections. In the process, the district court characterized this case as one governed by Section 5 of the Voting Rights Act and held that, as a result, the requirements of Section 2 of the Act were not fully applicable. Consequently, the following questions are presented:

1. Is the district court obligated to comply fully with the requirements of Section 2 of the Voting Rights Act in devising its own redistricting plan?

2. When a court seeks only to comply with Section 5 of the Voting Rights Act in devising a redistricting plan for a covered jurisdiction, must the court, nevertheless, comply fully with Section 2 as well, as required by the Attorney General's regulations for the implementation of Section 5?

3. In a state with a long history of racial discrimination, racially polarized voting and denial of minority voting opportunities, does a redistricting plan that provides for majority/minority districts in which equal opportunity is measured by only 50.1% of the black voting age population, satisfy the requirements of Section 2?

4. Did the court err in giving greater deference to the state policy of maintaining county lines than to the federal requirement of racial fairness?

Parties To The Proceeding

The appellant, Carroll A. Campbell, Jr., Governor of South Carolina, is a cross-appellant in this appeal which was brought by the following appellants: Statewide Reapportionment Advisory Committee, D. William Gibson, Bishop Frederick Calhoun James, Rev. Herbert Williams, Willie B. Owens, and South Carolina State Conference of the NAACP Branches. The appellees are Nick Theodore, Lieutenant Governor of South Carolina, Robert J. Sheheen, Speaker of the South Carolina House of Representatives, and James B. Ellisor, Executive Director of the South Carolina State Election Commission. Governor Campbell was a defendant below.

In the consolidated case of Burton v. Sheheen, C.A. No. 3:91-2983-1, the plaintiffs were Michael G. Burton, William P. Collins, III, Earl Copeland, William Patrick Flack, Frank E. Gibson, III, Nancy D. Hawk, and Gus Roberts. Kimberly T. Burch was a plaintiff intervenor. The defendants were Robert J. Sheheen, Nick Theodore, James B. Ellisor, and Governor Carroll A. Campbell, Jr. The defendant-intervenors were Robin Tallon, Neil A. Vander Linden, Forrest E. Ott, Philip T. Jones, Ann Y. Hart, Peggy A. Dufek, Gwendolyn L. Grooms, the South Carolina Senate, and the Democratic Party of South Carolina.

In the consolidated case of Blanton v. Campbell, C.A. No. 3:91-3635-1, the plaintiffs were Bufort Blanton, Neil A. Vander Linden, Forrest E. Ott, Ann Y. Hart, Peggy A. Dufek, and Vincent Johnson. The defendants were Governor Carroll A. Campbell, Jr., Nick Theodore, Robert J. Sheheen, James B. Ellisor, Dorchester County Legislative Delegation, State of South Carolina, Sherry Martschink, Stephen E. Gonzales, Annette Young, Sandra

S. Wofford, George H. Bailey, John W. Matthews, Jr., Michael T. Rose and the South Carolina Senate.

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JURISDICTIONAL STATEMENT

Opinions Below

The May 1, 1992, opinion and order of the three-judge court for the District of South Carolina, which implemented redistricting of the congressional and legislative districts in South Carolina, is unreported. It appears in the Appendix to the jurisdictional statement filed by the appellants Statewide Reapportionment Advisory Committee, et al., (hereinafter "SRAC") and is incorporated herein by reference. The May 15, 1992, judgment of the three-judge court is also unreported; it,

too, appears in the Appendix filed by SRAC and is incorporated herein by reference.

Jurisdiction

The order and judgment of the three-judge court for the District of South Carolina were entered on May 1, 1992, and May 15, 1992, respectively. Cross-appellant Governor Carroll A. Campbell, Jr. (hereinafter "Governor Campbell"), filed notice of appeal on June 1, 1992. See Appendix 1, infra.

This cross-appeal is being docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in the case are Article I, Section 2 of, and the First, Thirteenth, Fourteenth and Fifteenth Amendments to, the Constitution of the United States, Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, and Article III, Section 3 of the Constitution of South Carolina, the pertinent texts of which are set out in the SRAC Appendix and are incorporated herein by reference. Pertinent portions of 28 C.F.R. §51 are set out in the Appendix hereto.

Statement of the Case[1]

The cross-appellant is the Governor of South Carolina. He was a defendant in each of three actions which were consolidated below for trial by the three-judge court.[2]

The plaintiffs alleged, inter alia, that the congressional and state legislative districts (which were the districts implemented after the 1980 census) violated the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs also sought the adoption of judicially approved plans for congressional and legislative districts which would comport with federal constitutional and statutory requirements of racial fairness. Contrary to the Order of the district court, none of the parties raised any claims based on Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Following the 1990 federal decennial census, no redistricting plans for the State of South Carolina were enacted into law. On January 14, 1992, however, the General Assembly of South Carolina reconvened and adopted redistricting plans for the House and Senate.[3] The proposed House plan contained twenty districts in

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[1]In addition to the Statement of the Case provided herein, Governor Campbell adopts the Statement of the Case presented by SRAC.

[2]A three-judge panel was appointed pursuant to 28 U.S.C. § 2284(a) (1992).

[3]No plan for congressional districts was passed by the General Assembly.

which blacks[4] comprised a majority of the voting age population. The proposed Senate plan contained nine districts in which blacks comprised a majority of the voting age population.

Both of these plans were vetoed by the Governor. In his veto message to the State House, Governor Campbell explained that the House plan failed to draw a sufficient number of minority districts as required by federal law. See Appendix 7-18, infra.[5] In addition, the Governor noted areas of retrogression where districts in which the 1980 percentage of voting age black population had been reduced in the 1990 plans. The Governor urged each legislative body to enact redistricting plans which would comply with federal law.

Because the Governor's vetoes were sustained, and no plans were thereafter enacted, these suits were filed in an effort to break the legislative impasse, which was recognized as such by the district court. The consolidated cases were set for trial beginning on February 18, 1992.

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[4]Although there are other protected minorities in the population of South Carolina, black Americans are, by far, the largest minority population. As a result, the proceedings below and this appeal refer to all minority populations in terms of black population.

[5]The Governor's veto messages identified specific geographic areas where large minority concentrations were submerged or fractured and detailed each area of the State in which the black population was, in the Governor's opinion, sufficiently large and geographically compact to comprise a single member legislative district.

At trial, all parties stipulated that the existing districts were unconstitutional because of gross population disparities. Because those districts violated the constitution, the district court did not reach the question of whether the existing districts also violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court found that, because of the constitutional violations, the existing election districts could not be used for the 1992 elections. As a result, the court received evidence regarding a court-ordered remedial plan.

In its post-trial order, the court below applied a "retrogression" standard which purported to satisfy Section 2 of the Voting Rights Act, and concluded that "retrogression refers to diminution in minority opportunity from what it had been under an earlier plan." SRAC Appendix 26. The court asserted that the Department of Justice regulations pertaining to retrogression utilize this same benchmark: "In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. 28 C.F.R. § 51.54 (1991)." Id. The court rejected as a measure of retrogression the comparison of proffered plans one to another without reference to the existing districts, noting that "such methodology serves as a 'racial ratchet,' which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of all other considerations, the benchmark against which all other plans must be measured." Id. at 30-31.

In assessing the application of § 2 to this case, the court stated:

> [I]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2. The issue, however, is not whether § 2 considerations are considered -- they most certainly are; but rather, whether the court is obligated to completely graft the tests and requirements of § 2, including the searching evidentiary requirements, into a § 5 proceeding.

Id. at 38.

The court specifically held that "it is not obligated to completely import the standards and requirements of § 2 into a proceeding under § 5" because of the fundamental differences between § 2 and § 5, the "time factor" associated with the case, and the lack of a clear legislative intent or judicial interpretation that the results test of § 2 should be completely grafted onto § 5. Id. at 39-45.

Next, the court analyzed the proposed plans as well as the court-drawn plans based on the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard; 2) the extent to which reasonable compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; and 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policy of the State of South Carolina.

Each of the plans proposed by the parties created a larger number of black majority districts than the plan adopted by the court. The difference was that the court plan deferred to the state policies of preserving the integrity of county boundaries and avoided what the court described as the "political thicket" that arises in pitting large numbers of incumbents against one another. Id. at 75. The plans drawn by the court had a lower total number of majority/minority districts than did the parties' proffered plans. In addition, the court determined that the percentage of minority concentration necessary to create such a district was a mere 50%.

Substantial Questions Are Presented for Review

This Court has frequently stated that it notes probable jurisdiction because of the importance of the issues presented, e.g., Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 219 (1980); Davis v. Scherer, 468 U.S. 183, 189 n.7 (1984), or because of a conflict in the decisions of lower courts, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980); Ward v. Illinois, 431 U.S. 767, 770-71 (1977), or because of a conflict with a decision of this Court, e.g., Dombrowski v. Pfister, 380 U.S. 479, 483 (1965); Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 84 (1988). This case presents questions of substantial importance involving the application of the racial fairness standards of Section 2 to court-ordered legislative redistricting. The decision of the three-judge court is also in conflict with the decisions of other lower courts and the decisions of this Court.

1. Is the district court obligated to comply fully with the requirements of Section 2 of the Voting Rights Act in devising its own redistricting plan?

During the 1990 cycle of redistricting, state and federal courts in eleven states have redrawn congressional or legislative district lines after a legislative impasse has been recognized.[6] These court-ordered plans are the first such plans to have been drawn since Congress amended Section 2 of the Voting Rights Act in 1982 and since this

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[6]Alabama, Wesch v. Hunt, 785 F.Supp. 1491 (S.D. Ala. 1992), aff'd sub nom. Camp v. Wesch, 112 S.Ct. 1926 (1992), petition for cert. filed, (U.S. June 5, 1992)(No. 91-1992); Arizona, Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. April 30, 1992); California, Wilson v. Eu, 823 P.2d 545 (Cal. 1992); Florida, DeGrandy v. Wetherall, TCA 92-40015-WS (N.D. Fla. July 17, 1992); Illinois, Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991); Michigan, Good v. Austin, 91-CV-74754DT (E.& W. D. Mich. March 23, 1992); Minnesota, Emison v. Growe, 782 F.Supp. 427 (D. Minn. 1992) prob. juris. noted sub nom. Growe v. Emison, 112 S.Ct. 1557 (1992); New York, Puerto Rican Legal Defense & Educ. Fund v. Gant, 92-CV-1521 (E.D.N.Y. 1992); Oregon, Berkman v. Roberts, 91-775-RE (D. Ore. Dec. 2, 1991); South Carolina, Burton v. Sheehen, 1992 WL 106354 (D.S.C. 1992) (No. Civ. A. 3:91-2983-1, Civ. A. 3:91-3310-1, Civ. A. 3:91-3635-1); and Texas, Terrazas v. Slagle, 789 F.Supp. 828 (W.D. Tex. 1991) aff'd sub nom. Richards v. Terrazas, 1992 WL 24306, 60 U.S.L.W. 3554, 60 U.S.L.W. 3576, 60 U.S.L.W. 3870, 60 U.S.L.W. 3878 (U.S. June 29, 1992) (No. 91-1270).

Court decided Thornburg v. Gingles, 478 U.S. 30 (1986). Because Gingles was careful to disclaim any intention of setting standards for a dilution claim involving a single-member districting scheme,[7] lower courts have followed varying philosophies in applying Section 2 in the context of a court-drawn plan.

The original language of Section 2 paralleled the language of the Fifteenth Amendment. See City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980). In City of Mobile, a plurality held that discriminatory intent was required to establish a violation of Section 2. Therefore, in creating a court-drawn plan prior to the 1982 amendments, a court had only to avoid discriminatory intent to comply with its constitutional duty under the Fifteenth Amendment.

In response to this Court's ruling in City of Mobile, in 1982, Congress amended Section 2 to include a "totality of the circumstances" test to determine whether racial vote dilution had occurred. See S. Rep. No. 417, 97th Cong., 2d Sess. 118 (1982); Gingles, supra, 478 U.S. 30, 35 (1986).

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[7]"We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in dilution of the minority vote." Id. at 47, n.12.

These amendments altered a drafter's duty from merely avoiding the subjective discriminatory intent standard and replaced it with the new, objective "totality of the circumstances" test. Based on this change in the law, legislatures and courts were then faced with the substantial question regarding the manner in which amended Section 2 of the Voting Rights Act should be applied when drafting redistricting plans.

In drafting court-ordered plans even prior to 1982, decisions of this Court recognized that federal courts have a "higher duty" in drafting redistricting plans than does a legislative body. Chapman v. Meier, 420 U.S. 1, 26 (1975). This higher duty is to insure that a court-ordered plan is "free from any taint of arbitrariness or discrimination." Roman v. Sincock, 377 U.S. 695, 710 (1964). When instituting a remedy, Connor v. Finch, 431 U.S. 407 (1977), requires the court to "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." Id. at 425.

Based on this prior case law, most courts concluded that, in order to meet the "higher standard" required by Connor, Section 2 criteria should be used in drawing congressional or legislative plans. "In preparing our redistricting plans, we determined that it is important to eliminate, or at least minimize, any possibility of their being challenged under section 2." Wilson v. Eu, 823 P. 2d 545, 563 (Cal. 1992). "The plan must comply with the requirements of Section 2 of the Voting Rights Act." Good v. Austin, 91-CV-74754DT (E.& W.D. Mich., March 23, 1992) at 5-6. "The constitution and the Voting Rights Act must be satisfied before a court considers the neutral criteria." Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. April 30, 1992) at 6. "We . . . analyze the [proffered] plans for any

discriminatory effects they may have on racial or language minorities solely under the terms of § 2 of the Voting Rights Act." Hastert v. State Board of Elections, 777 F.Supp. 634, 646 (N.D. Ill. 1991). "Though Gingles dealt with vote dilution in the context of multimember districts, courts in this Circuit have adopted the use of its test in single-member district litigation." Terrazas, supra, note 5, at 833.[8]

These courts concluded that, by evaluating Section 2 evidentiary issues during the drafting stage and implementing Section 2 criteria in the court-drawn plan, the court would avoid future Section 2 litigation for a decade. For example, by insuring that, wherever racially polarized voting was present, a majority district comprised of a sufficiently large and geographically compact minority population would be created, a court could meet, in advance, any minority group claim under the first prong of the Gingles test. This approach to Section 2 would also insure that minority voting strength was never diluted.

In contrast to that approach to drafting plans, the court below in this case refused to engage in the

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[8]In Alabama, the court was provided with a stipulation by the parties that the African-American population was "sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African-American Congressional district." This "avoided the necessity of the court considering prolonged testimony regarding whether Section 2 of the Voting Rights Act requires the creation of such a district under the circumstances present in this case." Wesch v. Hunt, supra, note 6.

"searching and practical evaluations of past and present reality" required by Gingles and Section 2.

> The issue, however, is not whether Section 2 considerations are considered--they most certainly are; but rather, whether the court is obligated to completely graft the tests and requirements of Section 2, including the searching evidentiary requirements into a Section 5 proceeding . . . the court holds that it is not obligated to completely import the standards and requirements of Section 2 into a proceeding under Section 5.[9]

SRAC Appendix 38.

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[9]The court below never articulated which "tests and requirements" it refused to apply in what it characterized as a Section 5 proceeding. Presumably, the court below was referring to the three-pronged Gingles test (a minority group must be sufficiently numerically large and geographically compact to constitute a single member district, be politically cohesive, and be otherwise unable to nominate and elect its preferred candidates due to white racial bloc voting) and the seven typical factors identified in the 1982 Senate Judiciary Committee majority Report accompanying amended Section 2. These factors include a history of official discrimination, racially polarized voting, discriminatory voting devices, candidate-slating processes, socio-economic status of minority groups, use of racial appeals in elections and the success of minority candidates. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 reprinted in 1982 U.S. Code Cong. & Admin. News 206-207; Gingles, supra at 36-37.

The question whether full compliance with Section 2 is required of courts drafting court-ordered plans is substantial. If Section 2 tests and standards are not to be employed fully in drafting redistricting plans, what substitute standards are to be applied? How should a court measure the voting strength of minorities to determine if a proposed plan dilutes that strength? How can a drafter determine what concentration of voting strength (50.1% or 65%) is sufficient to insure that minorities have an equal opportunity to nominate and elect candidates of their choice? How many districts need to be drawn in order to insure compliance with the federal policy to insure fair group representation. In sum, if the court does not employ the Gingles tests and Senate standards, what is the measure of the Court's duty?

Last year in Chisom v.Roemer, 111 S.Ct. 2354 (1991), this Court rejected the use of judicially created limitations to restrict coverage under Section 2. In Chisom, the court stated that "[e]ven if serious problems lie ahead in applying the 'totality of circumstances' described in §2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." Id. at 2368. The limitations on full Section 2 compliance in the decree of the court below suggests that this Court's guidance is needed to direct lower courts to comply with Section 2 and with the requirement that the Voting Rights Act "should be interpreted in a manner that provides the broadest possible scope in combatting racial discrimination". Id. at 2368, quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969). Because the court below holds that some standard less than full Section 2 review applies, a substantial question is presented.

2. When a court seeks only to comply with Section 5 of the Voting Rights Act in devising a redistricting plan for a covered jurisdiction, must the court, nevertheless, comply fully with Section 2 as well, as required by the Attorney General's regulations for the implementation of Section 5?

Section 5 of the Voting Rights Act requires that any change in voting enacted by a covered jurisdiction be submitted for preclearance to the Attorney General or to a three-judge panel in the District of Columbia.[10] 28 C.F.R. § 51.1 Numerous jurisdictions are "covered", including the entire State of South Carolina.[11]

A district court's duty pursuant to Section 5 was defined in McDaniel v. Sanchez, 452 U.S. 130 (1981). McDaniel held that, whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives, the preclearance requirement is applicable. The sole exception to this policy is "where the court, because of exigent circumstances, actually fashions the plan itself." Id. at 148-49. This Court justified that exception by reference to the legislative history

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[10]A Section 5 proceeding usually consists of an action for a declaratory judgment or an action to enjoin a jurisdiction from implementing an unprecleared voting change under 42 U.S.C. 1973c (1992). The lower court's characterization of this case as "arising under Section 5" is novel.

[11] For a listing of all covered jurisdictions, see the Appendix to 28 C.F.R. Part 51 (1991).

accompanying the legislation which extended the Voting Rights Act. "[I]n fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Id. at 149, quoting S. Rep. No. 94-295, pp. 18-19 (1975).

Similarly, in 1982, when Congress undertook to amend the Voting Rights Act, it examined the continuing problems of non-compliance with Section 5, particularly with regard to statewide redistricting plans. The relevant section of the Senate Judiciary Committee Report discusses the relationship between Section 5 and amended Section 2 as follows. "In some of these cases [referring to the 1980 redistrictings] successive plans have been submitted and rejected several times." S. Rep. No. 417, 97th Cong., 2d Sess. 12 (1982). A note [Footnote 31] to this text explains:

> The continuing problem with reapportionments is one of the major concerns of the Voting Rights Act. As we have recognized before, even when changes are made for valid reasons, for example, reapportionment or home rule, "jurisdictions may not always take care to avoid discriminating against minority voters in the process."
>
> Under the rule of Beer v. United States, a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution." In light of the amendment to section 2, it is intended that a section 5 objection also

> follow if a new voting procedure itself so discriminates as to violate section 2.

Id. (citations omitted).

Before 1987, the courts and the Attorney General followed the Section 5 standards which were restatements of judicial holdings such as Beer v. United States, 425 U.S. 130, 141 (1976); City of Lockhart v. United States, 460 U.S. 125 (1983); and Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), cert. denied sub nom., City Council of the City of Chicago v. Ketchum, 471 U.S. 1135 (1985). In 1987, in response to the 1982 amendments to the Voting Rights Act and changes in decisional law, the Department of Justice amended its Section 5 regulations to add to the preclearance review process the "totality of the circumstances" test embodied in Section 2. See 28 C.F.R. § 51.55(b) (1991). Not only is the 1990 redistricting the first redistricting cycle to which the amended Section 2 standards apply, it is also the first to be measured by the amended Section 5 regulations.

The court below rejected the Governor's and SRAC's contention that, because Section 5 standards now include a Section 2 analysis, the court was obligated to apply Section 2 as directed by McDaniel, supra. Appellants' position was based, in part, on deference to the decision of an administrative agency interpreting its own regulations and on the legislative history, including footnote 31, that accompanied the 1982 amendments.

Appellants' contentions are also supported by other federal courts. In Terrazas, supra, note 6, the Texas panel examined the relationship between Section 2 and Section 5 and concluded:

> Since 1975, Texas has fallen within the scope of Sec. 5 of the Voting Rights Act... A Sec. 5 review is primarily concerned with whether the proposed change causes a retrogression in minority voting strength, though (Department of Justice) guidelines currently require the plan to be scrutinized for non-compliance with Sec. 2 ....

Id. at 833.

In this case, the court below reached a different conclusion:

> [W]e are not persuaded that in amending the provisions of § 2 in 1982 that Congress had the intent of amending the standard to be applied in § 5 actions. The proponents of such an incorporation cite footnote 31 of the Senate report at 12 which states that "in light of the amendment to § 2 it is intended that a § 5 objection also follow if a new voting procedure violates section 2." While this may be true, it does not necessarily speak to the standard the court is to apply to the § 5 objection. More to the point, in the vast consideration of both § 2 and § 5 during the amendments to § 2 in 1982, had congress intended to change the well-known standard applied to § 5 in Beer, it would not relegate such an important decision to a single footnote."

SRAC Appendix 44-45.

If this Court determines that Section 2 tests apply nationwide, then there would be no need to establish a

second, watered-down Section 2 test for covered jurisdictions. However, if only a weaker Section 2 analysis is required for all courts, as the lower court held in this case, then the further substantial question arises as to how the Section 5 regulations, incorporating Section 2 tests and standards, should be applied in covered jurisdictions.

> **3. In a state with a long history of racial discrimination, racially polarized voting and denial of minority voting opportunities, does a redistricting plan that provides for majority/minority districts in which equal opportunity is measured by only 50.1% of the black voting age population, satisfy the requirements of Section 2?**

Inherent in any review of redistricting proposals for racial fairness under amended Section 2, is the question whether the plan dilutes minority voting strength. In order to determine whether there is dilution, there must be a standard national policy gauging the "racial fairness" of single-member district plans. The Gingles opinion was a plurality opinion which left this question unclear.

Although Justice O'Connor's concurring opinion criticized the plurality's "maximum feasible minority voting strength" approach, she characterized the plurality's standard for vote dilution as follows:

> If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then §2 is violated.

Gingles, 478 U.S. at 91.

If this test, as the plurality opinion would certainly appear to make it, is the test for a violation of Section 2, then the plan adopted by the court below is defective. Plans proffered by the parties created more black voting age population majority districts than did the court. For example, the Governor's plan for the legislature created two additional Senate districts with a majority black voting age population and ten additional House districts with a majority black voting age population.

There is also a substantial question how a court should determine what percentage of the protected group should comprise a majority/minority district. The two questions (1) number; and (2) percentage concentration of minority/majority districts are intertwined because the lower the percentage concentration required, the greater the number of minority/majority districts that can be configured. By using a 50% black voting age population standard, the court below should have been able to create more black districts; however, the opposite result was obtained in the court's plan: fewer districts were created and the ones that were created have lower concentrations of black voters than alternatives offered by the parties.

Because voting strength is measured by the number of districts which can be drawn, one first must articulate the standards to determine the percentage of the minority group necessary to comprise a minority district. Most courts have taken as their point of departure the 65% standard first articulated by this Court in United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977). See e.g., Ketchum, 740 F.2d 1398; Neal v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988); Rybicki v. State Bd. of Elections, 574 F.Supp. 1147, 1149 (N.D. Ill. 1983).

In fashioning relief for a Section 2 violation, the Coleburn court concluded that the 65% standard was a flexible and practical guideline. 689 F.Supp. at 1438. The 65% standard may, however, be "reconsidered and adjusted in the light of 'new information' and changing circumstances." Id. Traditionally, the "new information" would consist of higher registration rates among minority voters, heightened voter turnout figures or lower levels of racial bloc voting. Accord Rybicki, supra, at 1149. This is precisely the evidence which would be explored during a Section 2 evidentiary hearing. Without such evidence, a court is, as was the court below, rudderless.

As a result, instead of applying existing Section 2 tests and standards, the court below substituted its own standard:

> "[A] district may be considered a black opportunity district if the percentage of the black voting age population is greater than 50 percent . . . Our use of voting age population as the measure for effective opportunity obviates the need to consider a 65% percent figure as an absolute means of effective political opportunity."

SRAC Appendix 49.

The court below went on to state that it would take into account white incumbency in drafting its plans although it does not state the manner in which this analysis was to be achieved.

This substitute standard fails to measure the extent to which past historical discrimination results in lower voter registration and turnout. In a state marked by extremely high levels of racial polarization, such a

standard almost certainly will not grant minority voters an equal opportunity to nominate and elect candidates of their choice. The SRAC and the Governor, both presented uncontradicted evidence that a higher voting age population majority was necessary to insure that the minority community could nominate and elect candidates of their choice.

The only reason given by the court below for its use of the substitute standard is to leave unimpaired a minority group's ability to bring a subsequent Section 2 lawsuit. This rationale directly contradicts the generally stated goal of other courts to draft a plan which will avoid Section 2 challenges in the future.

The court below also determined that dilution of minority voting strength was to be judged under the standard that voting changes neither have the "purpose ... [nor] the effect of denying or abridging the right to vote on account of race." Unsurprisingly, the court concluded that, as a "given", it was not acting with racially discriminatory purposes. Id. at 25.

The court then examined its plans for retrogression under Beer, Lockhart and Ketchum. By using the retrogressions standard, the court determined only whether its plan reduced the number of seats in which minorities were in a majority in the prior census.

The retrogression standard may marginally improve the position of some black communities; however, it fails to eliminate completely the present day racial discrimination in voting which is required by Section 2. If, for example, the 1980 plan did not adequately measure the voting strength of minorities or if demographic changes had increased the voting strength of the minority, a retrogression analysis would fail to measure the undiluted

voting strength of minority voters. The adoption of the retrogression standard in the opinion of the court below created an artificially low measure of minority voting strength of only 21 House and Senate seats. For example, the Governor's plan (as did others) created both more Senate and House districts with black voting age majorities. The sole reason for rejection of these plans was to implement the proffered state policy of preserving county lines. It is obvious, however, that inflexible adherence to this policy reduces the voting strength of minorities.

The constitutional goal of "fair group representation" can only be achieved by proper measurement of undiluted voting strength. The functional "totality of the circumstances" approach calls for a "searching and practical evaluation of past and present political reality." The use of the retrogression standard by the court below, rather than the "totality of the circumstances" test, raises a substantial question.

4. Did the court err in giving greater deference to the state policy of maintaining county lines than to the federal requirement of racial fairness?

The court below identified county line integrity as an important state policy and, accordingly, sought to preserve the State's county lines in creating legislative districts. In fact, "[t]he only cognizable state policy the court considered was the preservation of county lines . . ." SRAC Appendix 62. The court erred by exalting a state policy over the federal requirement of racial fairness as expressed in Section 2. The court's insistence upon rigid application of this one state policy clearly had the effect of unnecessarily dividing and fracturing minority communities

in areas which could have been included in properly drawn minority districts, as illustrated by the Governor's plans.

While county line integrity may be a legitimate or acceptable redistricting criterion, it cannot be controlling as the only policy consideration. Rybicki v. State Bd. of Elections, 574 F.Supp. 1082 (N.D. Ill. 1982). More importantly, adherence to geographical units cannot overcome equal protection guarantees. See Connor v. Finch, supra.

Under the Supremacy Clause of the United States Constitution, Art. VI, § 2, the Voting Rights Act takes precedence over any state guidelines with which the Act may conflict. Reynolds v. Sims, 377 U.S. 533 (1964), recognized that, in the voting rights context, expressions of state policy choices are necessarily subordinate to federal requirements. "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." Id. at 584. Thus, the court below was not free to subordinate federal policies to perceived state interests.

The rule announced in Connor v. Finch requires configuration of legislative districts that comply with equal population principles, regardless of state policies which promote county line maintenance. A court must articulate reasons for departing from the population equality requirement. Similarly, in adopting a redistricting plan, a court has a corresponding duty to explain departures from the standards of Section 2 implementing federal policies of racial fairness. In the present case, the court below rejected the application of Section 2 standards which, as explained in the Governor's alternative plans, provided more minority districts than the court's own plan and had

less population deviation.[12] Quite clearly -- and quite

---

[12]The Governor's plan not only created more effective minority districts but also created more minority districts wholly within county boundaries, where the court's plan creates none. For example, in the Governor's House plan within Richland, Beaufort, and Charleston counties, three additional black voting age majority districts are created for which there is not even one corresponding House district in the Court's plan. In addition, even when county lines are crossed in the court's plan, the effect is not to create the black majority voting age districts which were feasible in those areas. For a demonstration of this phenomenon, compare:

	Court House District	Governor House District
In Georgetown County	103 50.01% BVAP	103 56.1% BVAP
	108 31.1% BVAP	108 15.3% BVAP
In McCormick and Greenwood Counties	12 32.5% BVAP	12 58.1% BVAP
	13 29.7% BVAP	13 13.2% BVAP
In Darlington and Marlboro Counties	56 29.6% BVAP	56 60.9% BVAP

BVAP = Black Voting Age Population

See Appendix 19, infra for maps and charts illustrating these differences graphically.

erroneously -- the court below maintained county line boundaries at the expense of the federal constitutional policy of racial fairness as expressed in Section 2. SRAC Appendix 72-73.

Conclusion

For these reasons stated, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED,

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
PATTON, BOGGS & BLOW
101 W. Friendly Avenue
P. O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Charles E. Carpenter, Jr.
Frederick A. Crawford
RICHARDSON, PLOWDEN, GRIER
& HOWSER, P.A.
1600 Marion Street
P. O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

Charles Fried
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Counsel for Appellant
***Counsel of Record**

APPENDIX

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App. 1

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, DR. WILLIAM GIBSON, BISHOP FREDERICK CALHOUN JAMES, REV. HERBERT WILLIAMS, WILLIE B. OWENS and SOUTH CAROLINA STATE CONFERENCE OF THE NAACP BRANCHES, Plaintiffs/**APPELLANTS**, vs. CARROLL A. CAMPBELL, JR., in his official capacity as Governor of South Carolina; NICK THEODORE, in his official capacity as Lieutenant Governor and presiding officer of the South Carolina Senate; ROBERT J. SHEHEEN, in his official capacity as Speaker of the South Carolina House of Representatives; and, JAMES B. ELLISOR, in his official capacity of Executive Director of the South Carolina State Election Commission Defendants/Appellees.	C.A. No. 3:91-3310-1

OF WHOM	)
	)
CARROLL A. CAMPBELL, JR., in his official capacity as Governor of South Carolina is **CROSS-APPELLANT.**	)
	)
KATHARINE I. BUTLER,	)
	)
Amicus Curiae	)
	)

(Filed June 1, 1992)

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendant/Appellee Carroll A. Campbell, Jr., in his official capacity as Governor of South Carolina, hereby cross-appeals to the Supreme Court of the United States from the Order and final judgment of the three-judge district court, adopting and creating plans for the redistricting of South Carolina's Senate, House of Representatives, and Congressional districts following the 1990 decennial census, entered in the above action on May 1, 1992, and on May 20, 1992.

This cross-appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted,

/s/Charles E. Carpenter, Jr.
Charles E. Carpenter, Jr./USDC#55
Frederick A. Crawford/USDC#352
Richardson, Plowden, Grier
& Howser
1600 Marion Street
P.O. Drawer 7788
Columbia, South Carolina 29202
Telephone: (803) 771-4400

/s/Robert N. Hunter, Jr.
Robert N. Hunter, Jr./USDC#5679
N.C. Middle District
Patton, Boggs and Blow
101 W. Friendly Avenue
Post Office Drawer 20004
Greensboro, North Carolina 27420
Telephone: (919) 273-1733

ATTORNEYS FOR DEFENDANT/ APPELLEE-CROSS-APPELLANT, CARROLL A. CAMPBELL, JR., in his official capacity as Governor of South Carolina

Columbia, South Carolina

June 1, 1992

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson, Plowden, Grier & Howser, attorneys for Defendant/ Appellee-Cross Appellant, Carroll A. Campbell, Jr. in his official capacity as Governor of South Carolina, do hereby certify that I have served the following **NOTICE OF CROSS-APPEAL** by depositing in a United States Postal Service mail box three copies of the same, postage prepaid, this 1st day of June, 1992, addressed to the individuals indicated below:

Thomas R. Gottshall
Steve A. Matthews
Sinkler and Boyd, P.A.
The Palmetto Center
1426 Main Street, Suite 1200
Columbia, South Carolina 29201
Attorney for Michael G. Burton, as Executive Director and on behalf of the Republican Party, et. al.

Treva Ashworth
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for defendants James Ellisor

and Robert J. Sheheen

Stephen Bates
Office of the Speaker
South Carolina House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211
Attorney for defendant Robert J. Sheheen
Vinton D. Lide
Attorney at Law
Post Office Box 11041
Columbia, South Carolina 29211
Attorney for Intervenor Congressman
Robert Tallon

Robert E. Stepp, Jr.
Terrell Glenn
Glenn, Irvin, Murphy, Gray and Stepp
Post Office Box 1550
Columbia, South Carolina 29202
Attorney for defendant
Nick Theodore

Hans F. Paul
Attorney at Law
11 Gamecock Avenue, Suite 1104
Charleston, South Carolina 29407
Attorney for Intervenors
Vander Linden

Laughlin McDonald
American Civil Liberties Union
Foundation, Inc.
44 Forsyth Street N.W., Suite 202
Atlanta, Georgia 30303

Dennis Courtland Hayes
Willie Abrams
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, Maryland 21215-3297

John Roy Harper II
Post Office Box 843
Columbia, South Carolina 29202
Attorney for Appellants

Gedney M. Howe III
Attorney at Law
Post Office Box 1034
Charleston, South Carolina 29402
Attorney for the South Carolina Senate

C. Havird Jones, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for James B. Ellisor

Frank S. Holleman III
Wyche, Burgess, Freeman and Parham, P.A.
Post Office Box 10207
Greenville, South Carolina 29603
Attorney for the Democratic Party of South Carolina

Roger E. Henderson
Post Office Box 190
Chesterfield, South Carolina 29709

Attorney for Kimberly T. Burch

Katharine I. Butler
Pro Se
USC Law School
Columbia, South Carolina 29208

The Honorable Michael T. Rose
State Senator
606 Gressette Building
Columbia, South Carolina 29202
Pro Se defendant Intervenor

/s/Sarah A. Pentz
Sarah A. Pentz, Secretary to
CHARLES E. CARPENTER, JR.

App. 8

STATE OF SOUTH CAROLINA

Office of the Governor

Carroll A. Campbell, Jr.
Governor

Post Office Box 11369
Columbia 29211

January 29, 1992

The Honorable Robert J. Sheheen
Speaker of the House
Room 506, Blatt Building
Columbia, South Carolina 29211

Dear Mr. Speaker:

I am returning without my signature H.3834 (R-259), the reapportionment Plan for the South Carolina House of Representatives.

I and my staff have carefully examined the districts that the House has drawn and have had extensive discussions with affected Representatives as well as representatives of minority groups concerning this plan. At the present time, the South Carolina House has 124 Representatives. During elections in the 1980's, racial minorities constituted a majority in 27 of the districts. From my review of the legislative debate, it became clear to me that more districts in which racial minorities comprise an effective majority could have been drawn. Alternative plans containing such proposals were introduced and defeated along racial and partisan lines. I think this action of the legislature was motivated by a desire to keep incumbents

in office at the expense of fairer minority representation. This is an unwise public policy.

Upon reviewing the objection letters from the United States Department of Justice concerning certain reapportionment plans in New York, Virginia, Georgia, North Carolina, Texas and Louisiana, I am convinced that the Justice Department would not preclear this plan as provided under Section 5 of the Voting Rights Act. Rather than delay the elections unnecessarily, I am returning this legislation in hopes that the House will remedy the following defects:

1. This plan fails to create additional minority districts:

It appears that lines could have been drawn in such a manner that minorities would have an equal opportunity to participate in elections and elect candidates of their choice. Several alternative plans which achieved this result were offered to the House but summarily rejected. These alternative plans created up to eight additional minority districts including:

A. An additional minority district in the Columbia area.

B. An additional minority district in the Charleston area.

C. An additional minority district in the Greenville area.

D. An additional minority district in Beaufort County.

E. An additional minority district in the Colleton-Hampton County area.

F. An additional minority district in Georgetown County.

G. An additional minority district in McCormick and Greenwood Counties.

2. Reducing minority populations in existing minority districts.

There has been noticeable retrogression in certain minority districts, particularly in District 70 in Richland County and District 23 in Greenville County. Upon review of the House Plan, there was a reduction of minority districts with a black population of 60% or more, from 15 districts under current law to 13 districts in the House Plan.

3. Fracturing of minority populations to benefit white incumbents at the expense of the creation of electable minority districts:

There are many areas of the state where minority districts could be created. Instead, these minority voting populations are fractured rather than combined to create effective minority districts as required under Federal law. The most obvious areas of fractured minority voting include the following districts:

A. Districts 67 and 64 in Clarendon and Sumter Counties fracture minority

voters to create a marginal minority district.

B. Districts 70 and 80 in Richland County fracture minority voters in Bluff precinct which results in retrogression in a minority district to benefit a white incumbent in District 80.

C. In Districts 72 and 73 in Richland County minority precincts are fractured to the benefit of a white incumbent in District 72 and resulting in one less minority district in Richland County.

D. Districts 93, 95, 96 and 66 fracture minority voters resulting in one less minority district.

E. Districts 108 and 103 fracture minority voters to create two ineffective districts rather than one effective minority district.

F. Districts 120-124 fracture minority voters resulting in a submergence of two minority districts.

G. Districts 109-118 fracture minority populations to benefit two white incumbents in Districts 118 and 110 rather than creating a minority district in this area.

H. Districts 41 and 43 fracture minority voters to benefit two white incumbents rather than create an effective minority district.

I. Districts 11, 12, 13 fracture minority voters to benefit three white incumbents rather than to create a minority district.

J. Districts 25, 24 and 28 fracture minority voters to benefit white incumbents rather than creating a minority district in District 25.

K. Districts 82, 39 and 81 fracture minority population rather than create a minority district.

L. Districts 60, 61, 65, 59, and 56 fracture minority populations to benefit white incumbents

rather than creating two additional minority districts.

M. Districts 9, 7 and 6 fracture minority populations to benefit white incumbents rather than creating one marginal minority district.

N. Districts 50, 68, 51, and 67 fracture minority populations to benefit white incumbents rather than creating effective minority districts.

By closely scrutinizing the House Plan, it appears minority districts were intentionally not drawn in order to further some political purpose--either to bolster existing voting strength of an incumbent or to shift the balance of political power in a county legislative delegation.

I have little choice but to veto the House Reapportionment Bill. If I were to do otherwise, it would be viewed as approval of a plan that violates principles established under Federal constitutional and statutory law. I am taking this action because I am convinced the General Assembly and the Governor have an obligation to create a reapportionment plan in compliance with Federal law. The Justice Department and the Federal Courts should not have to reapportion the legislature.

When my veto is sustained, I welcome the opportunity to discuss these specific changes in the legislation which

address my concerns in an equitable manner. This discussion should include the leadership of the House and Senate as well as with representatives of those minority groups that have expressed concern about the plans adopted by the House and Senate. I look forward to signing legislation that meets the requirements of Federal law.

Sincerely,

Carroll A. Campbell, Jr.
Governor

CAC,Jr./pwf

STATE OF SOUTH CAROLINA

Office of the Governor

Carroll A. Campbell, Jr.
Governor

Post Office Box 11369
Columbia 29211

January 29, 1992

The Honorable Nick A. Theodore
President of the Senate
State House, 1st Floor, East Wing
Columbia, South Carolina 29202

Dear Mr. President:

I am returning without my signature S.1003 (R-258), the reapportionment Plan for the South Carolina State Senate.

I and my staff have carefully examined the districts that the Senate has drawn and have had extensive discussions with affected Senators as well as representatives of minority groups concerning this plan. At the present time, the South Carolina Senate has 46 Senators. During elections in the 1980's, racial minorities constituted a majority in ten of the districts. From my review of the legislative debate, it became clear to me that more districts in which racial minorities comprise an effective majority could have been drawn. Alternative plans containing such proposals were introduced and defeated along racial and partisan lines. I think this action of the legislature was motivated by a desire to keep incumbents

in office at the expense of fairer minority representation. This is an unwise public policy.

Upon reviewing the objection letters from the United States Department of Justice concerning certain reapportionment plans in New York, Virginia, Georgia, North Carolina, Texas and Louisiana, I am convinced that the Justice Department would not preclear this plan as provided under Section 5 of the Voting Rights Act. Rather than delay the elections unnecessarily, I am returning this legislation in hopes that the Senate will remedy the following defects promptly:

1. This plan fails to create additional minority districts:

It appears that lines could have been drawn in such a manner that minorities would have an equal opportunity to participate in elections and elect candidates of their choice. Several alternative plans which achieved this objective were offered to the Senate but summarily rejected. Some alternatives include:

A. An additional district in the Savannah Valley region between the cities of Aiken and Anderson whereas the Senate created only influence districts in Districts 10 and 25 by fracturing minority voting populations in this area.

B. An additional district in Georgetown, upper Charleston, Williamsburg and Marion Counties, whereas the Senate plan fractures minority voters

between District 37, 34, 32 and 28, thus diluting their voting strength.

C. An additional district in Union, Spartanburg, York and Chester Counties, whereas the Senate plan fractures minority voters among Districts 13, 18, 16, and 27.

2. Marginal or non-electability of certain districts identified as majority minority population districts:

Of the 11 majority minority districts in the Senate proposal, District 40 has a total black population of 51.20% and black voting age population of only 49.226%. Other introduced plans created higher black population percentages in black districts. The Senate Plan therefore creates no more black districts than already exist. It is possible to create at least three other districts with a black voting age majority.

Other plans introduced in the Senate created more minority districts than the Senate plan. *At the same time,* these alternative plans had total black population and black voting age population percentages that were higher than almost all those districts in the Senate plan. The result of the lower black percentages in the Senate plan could very well be a deciding factor in elections in several districts.

The Senate Plan also did not create any open minority districts where a minority would not face the enormous task of a challenge against a well financed and entrenched white incumbent. Other plans introduced in the Senate

created as many as three districts where no incumbent currently resides.

3. Justifications for the Senate's failure to create additional minority districts are pretextual.

The Senate has offered two reasons for its failure to create additional minority seats or more electable minority districts. Comments by certain members of the Senate indicate that such districts were not created to avoid division of the criteria of communities of interests and split precincts.

Precincts are merely political instrumentalities drawn for political convenience. A quick review of the precincts in this State will show many have rambling boundaries created for reasons unknown or long forgotten. Many precincts have gone through enormous demographic changes. State law (Section 7-7-710) mandates that precincts be split when they achieve 1500 or more registered voters. Currently, the State Election Commission identifies 108 (5%) precincts that exceed 1500 registered voters. We have precincts that range in population as small as 37 people to as large as 27,000 people. These precincts have undergone little change and would be relatively easy to adjust through local legislation.

Local Bills are currently pending approval that would redraw precinct lines in several counties to conform with the census voting tabulation districts adopted throughout this reapportionment process. The precincts that are currently split in these two counties are split by VTD's not yet drawn as precincts in those counties.

In a recent review of one State's proposed redistricting plan (submitted to the Civil Rights Division of the Justice Department), the Assistant Attorney General expressed the following comments regarding this issue. "If such splits (of precinct) lines are necessary in order to adopt a proper plan, the county may then adjust its precincts to follow the new district lines. It is clear that where the Justice Department is concerned that the integrity of precinct lines is not to be used to dilute minority voting strength.

There are over 1800 precincts in this State, and even under the plan with the most split precincts, the splitting of existing precinct lines totals no more than 8% of all the precincts. Upon review of our current House Plan adopted during the last reapportionment, there are at least 225 split precincts, and the Senate districts under current law split approximately 130 precincts. The splitting of precincts was not a concern in the 1980's reapportionment. Its application now is tenuous.

Upon review of alternative plans, it appears the splitting of existing precincts was done for the purpose of meeting the first two criteria adopted by the Senate--one man one vote and the creation of minority districts. Alternative plans introduced in this Senate appear to properly split precincts in order to meet the two most important criteria in redistricting: "one man, one vote" and the effort to create minority districts where possible. These criteria are well-known, originating in federal statutory and case law and also adopted as guideline in early 1991 by the Senate.

The second justification for the failure to create additional districts is the maintenance of communities of interest. Upon my review of the Senate Plan for maintenance of

communities of interest, I have found at least four districts that certainly share little commonality or compactness.

A. Senate District 24--There clearly is no commonality or community of interest between suburban Columbia and Lexington County and suburban Augusta, Georgia, in a district that is connected by a point.

B. Senate District 16--York County, starting in suburban Charlotte (and crossing a lake at a point in the process) clearly does not share a community of interest with suburban Columbia.

C. Senate District 18--There is no commonality of interest in a district that goes from Chapin in Lexington County to the Spartanburg County line near Cowpens.

D. Senate District 34--There is no commonality of interest between the City of Conway in Horry County and Goose Creek in Berkeley County.

By closely scrutinizing the Senate Plan, one can conclude that minority districts were intentionally not drawn in order to further some political purpose--either to support an existing voting strength for an incumbent, or to shift the balance of political power in a county legislative delegation. A concern for compactness and communities of interest is not consistently applied. Rather, it is being

used to maintain the status quo by creating Senate districts that only maximize the opportunity for the re-election of some incumbents. I have little choice but to veto the Senate Reapportionment Bill. If I were to do otherwise, it would be viewed as approval of a plan that violates principles established under Federal Constitutional and statutory law. I am taking this action because I am convinced this reapportionment should be done correctly before the Justice Department and the Federal Courts reapportion the legislature.

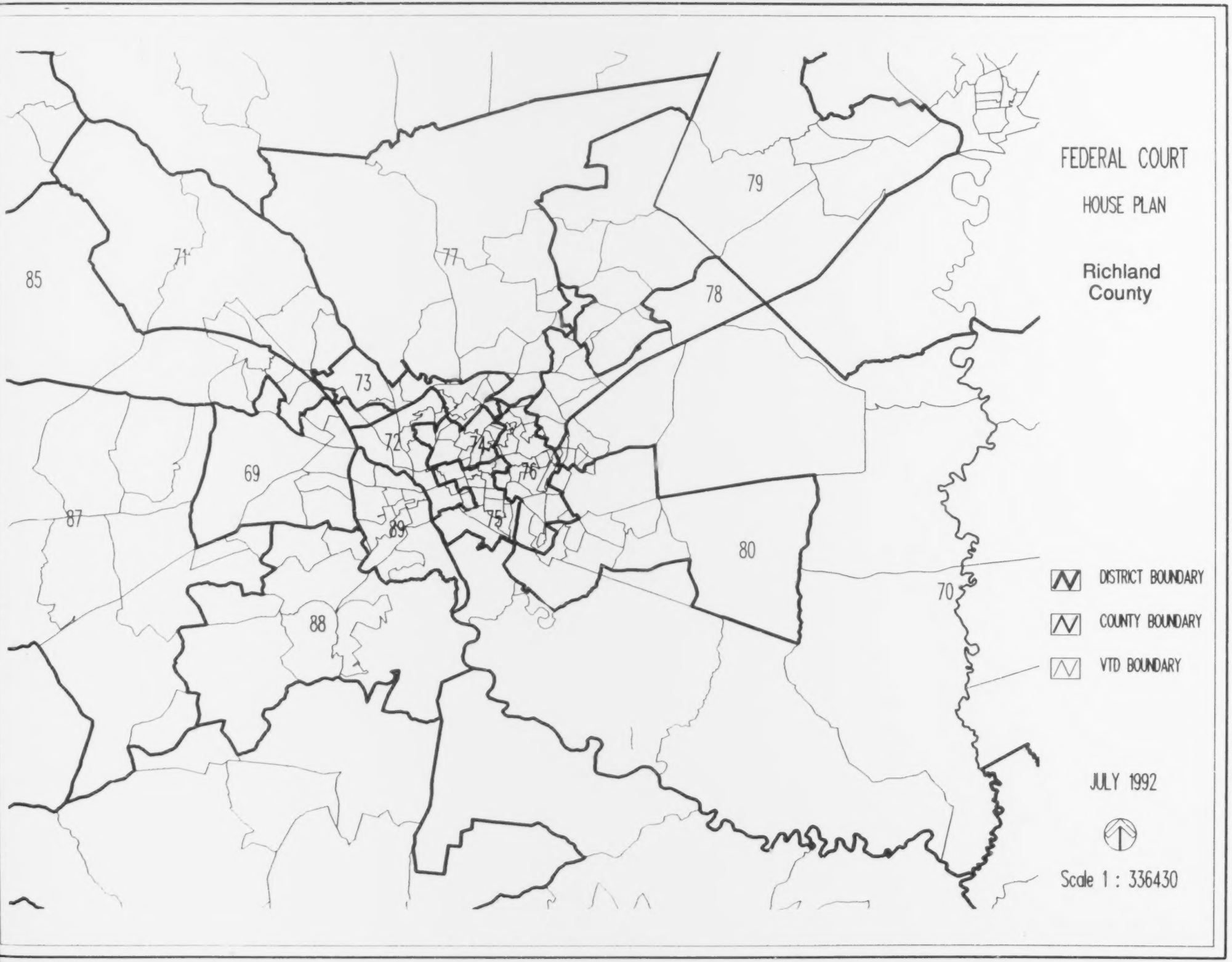
When my veto is sustained, I welcome the opportunity to discuss these specific changes in the legislation which address my concerns in an equitable manner. This discussion will include the leadership of the House and Senate as well as with representatives of those minority groups that have expressed concern about the plans adopted by the House and Senate. I look forward to signing a plan that will meet the requirements of Federal law.

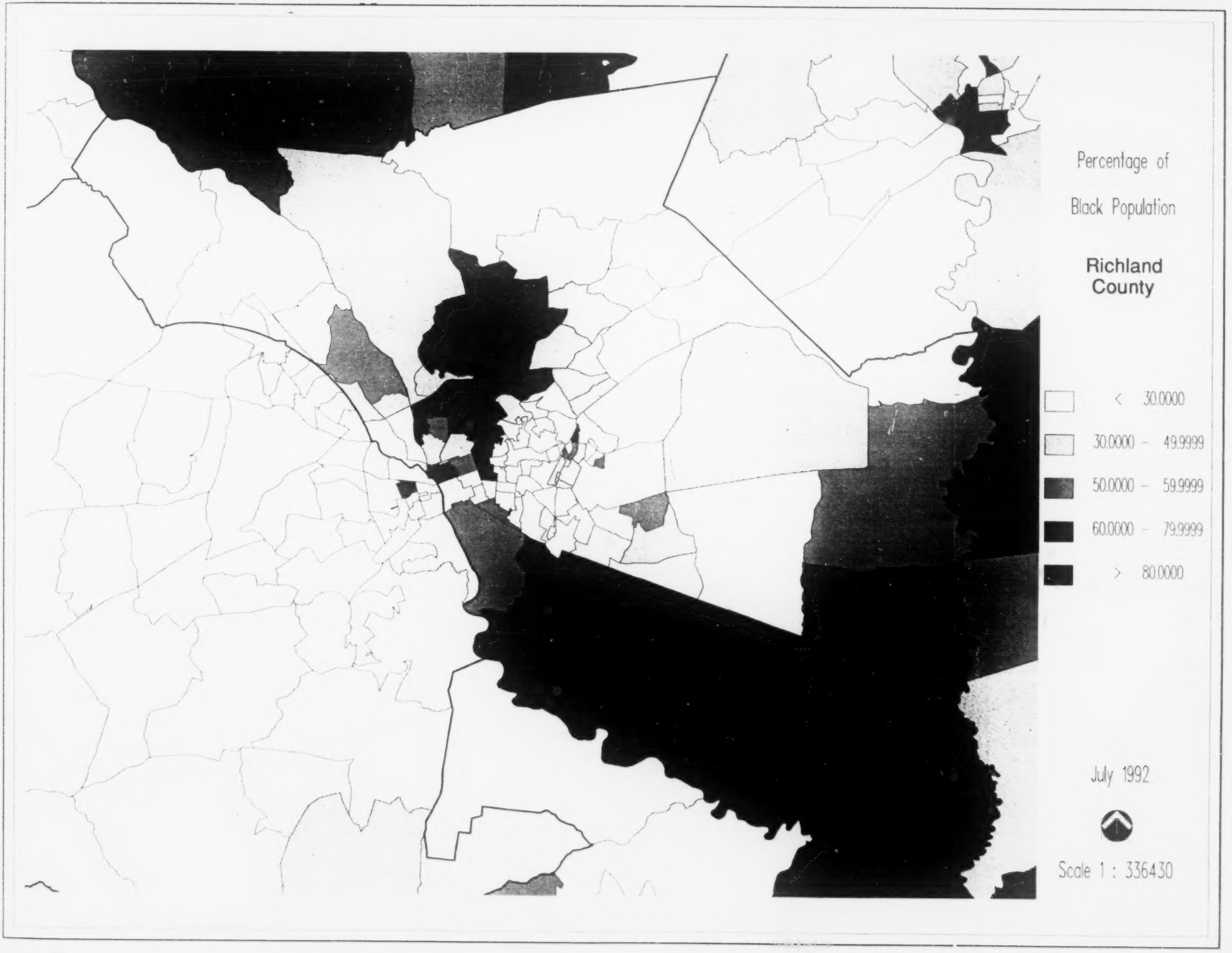
Sincerely,

Carroll A. Campbell, Jr.
Governor

CAC,Jr/pwf


GOVERNOR'S OFFICE
HOUSE PLAN
Richland County
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 336430
85
77
79
80
73
72
71
74
78
69
76
89
75
88
70


FEDERAL COURT
HOUSE PLAN
Richland County
79
77
78
71
85
73
72
74
76
69
87
89
75
80
70
88
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 336430


Percentage of
Black Population
Richland
County
< 30.0000
30.0000 - 49.9999
50.0000 - 59.9999
60.0000 - 79.9999
> 80.0000
July 1992
Scale 1 : 336430



GOVERNOR'S OFFICE

HOUSE PLAN

Beaufort County

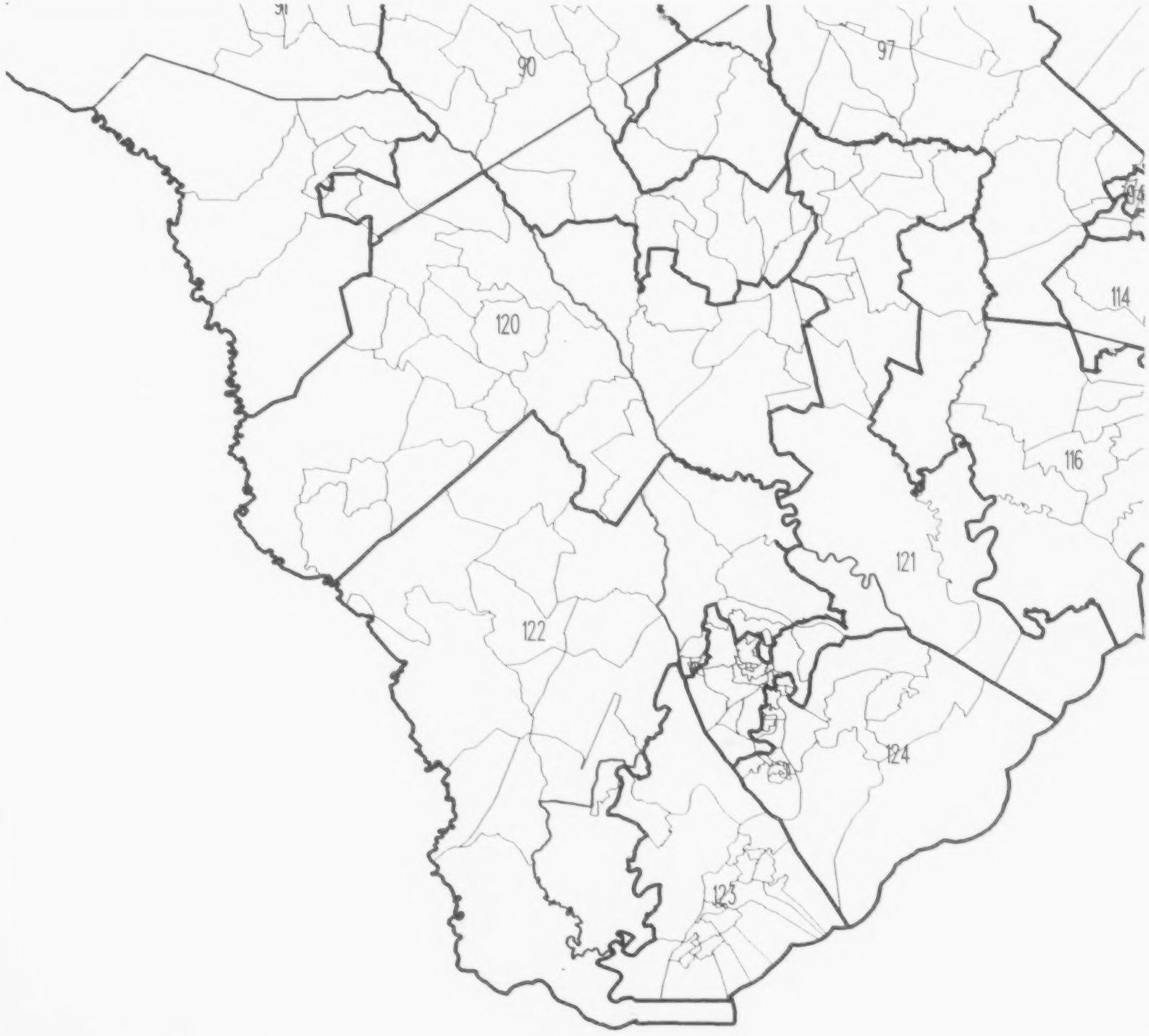
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COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

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FEDERAL COURT

HOUSE PLAN

Beaufort
County

DISTRICT BOUNDARY

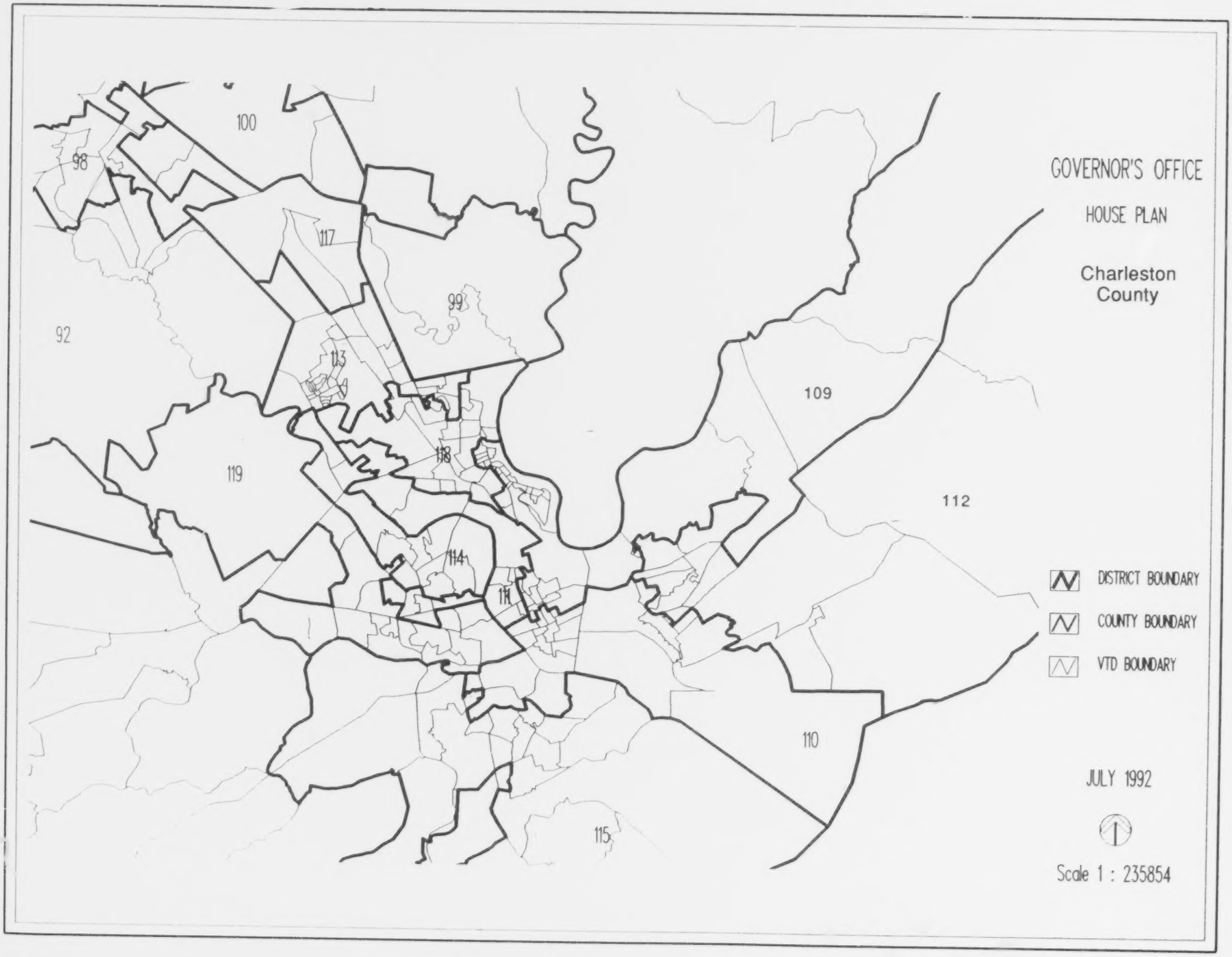
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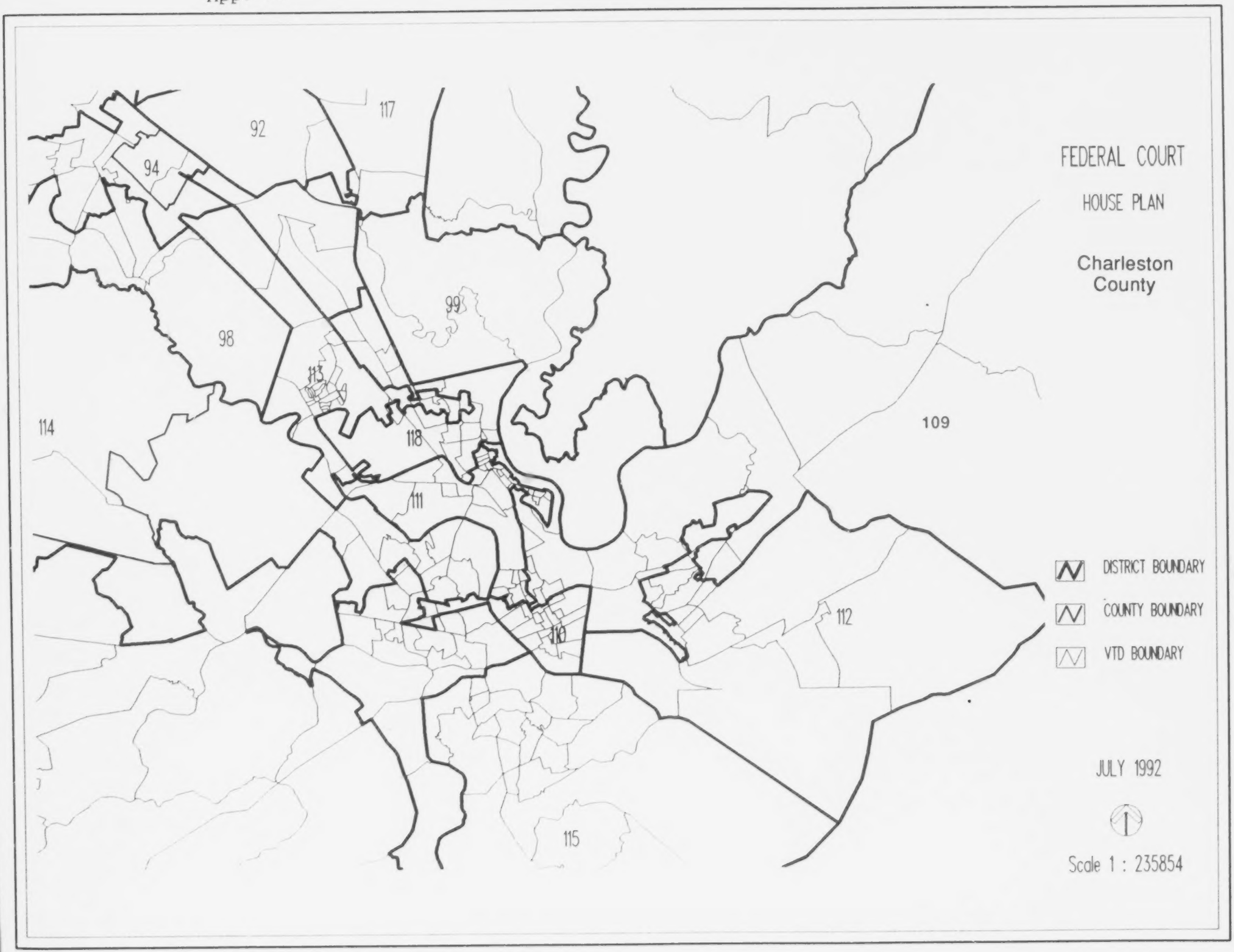
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JULY 1992

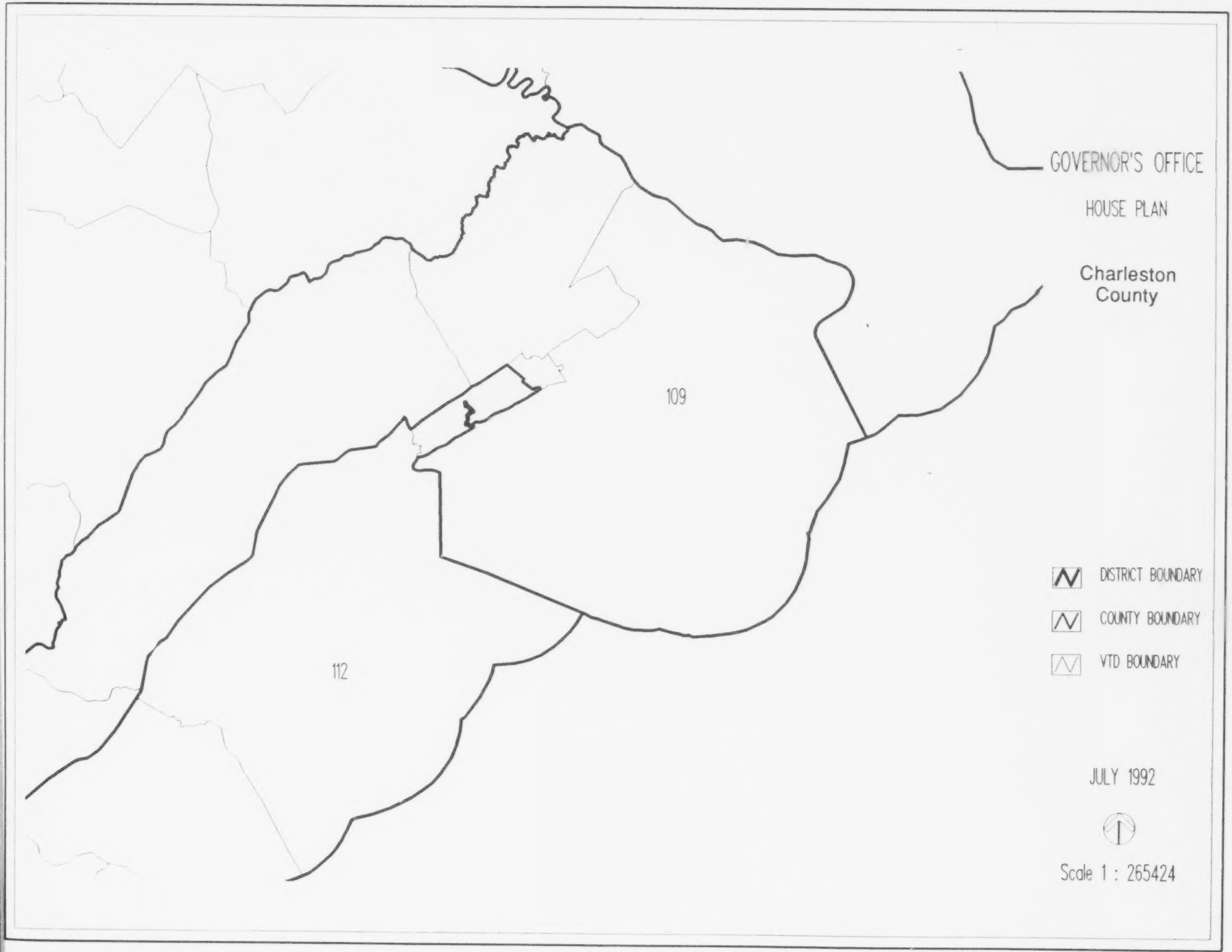
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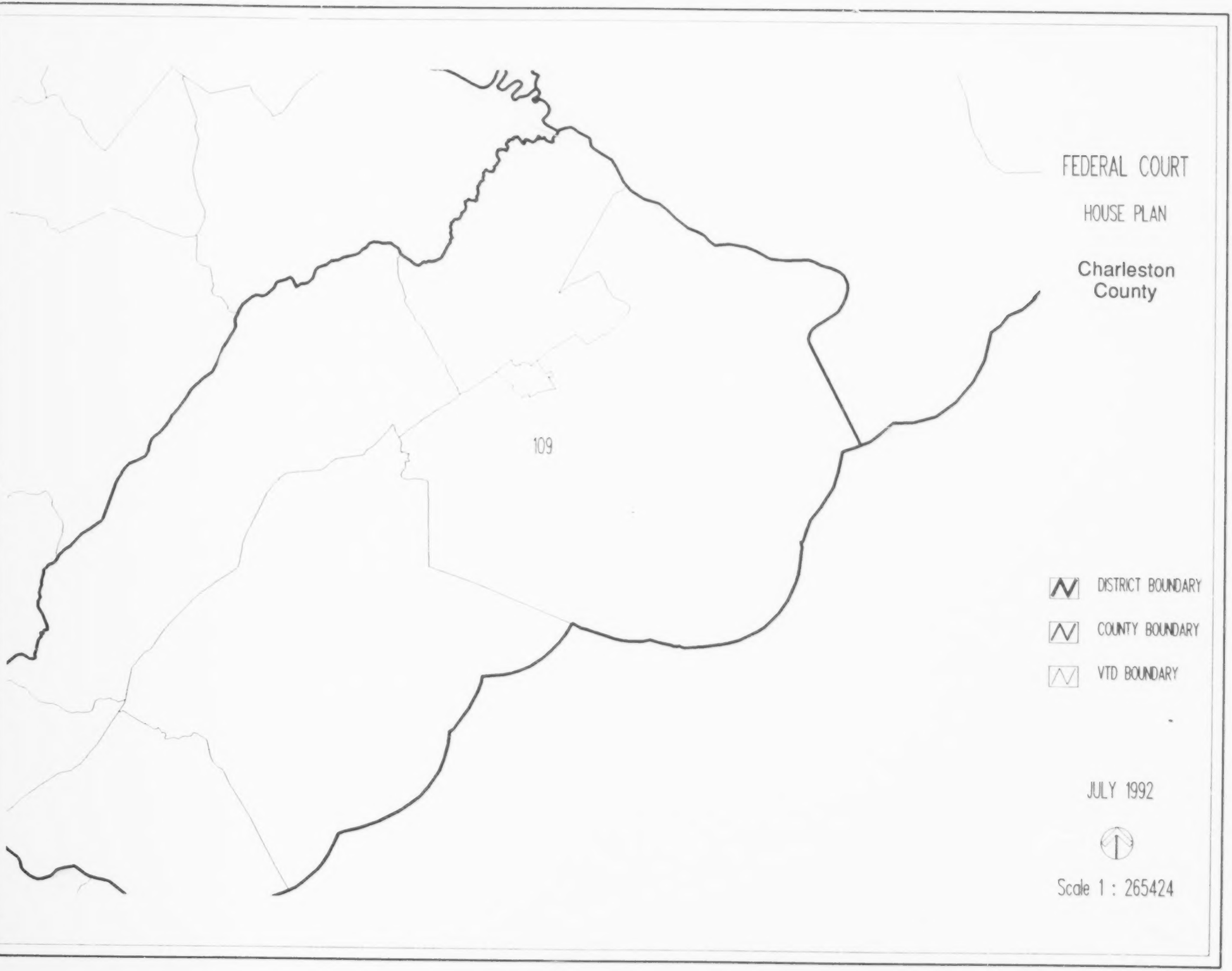

Percentage of
Black Population
Beaufort
County
< 30.0000
30.0000 - 49.9999
50.0000 - 59.9999
60.0000 - 79.9999
> 80.0000
July 1992
Scale 1 : 694320


GOVERNOR'S OFFICE
HOUSE PLAN
Charleston County
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 235854
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98
117
99
92
113
109
119
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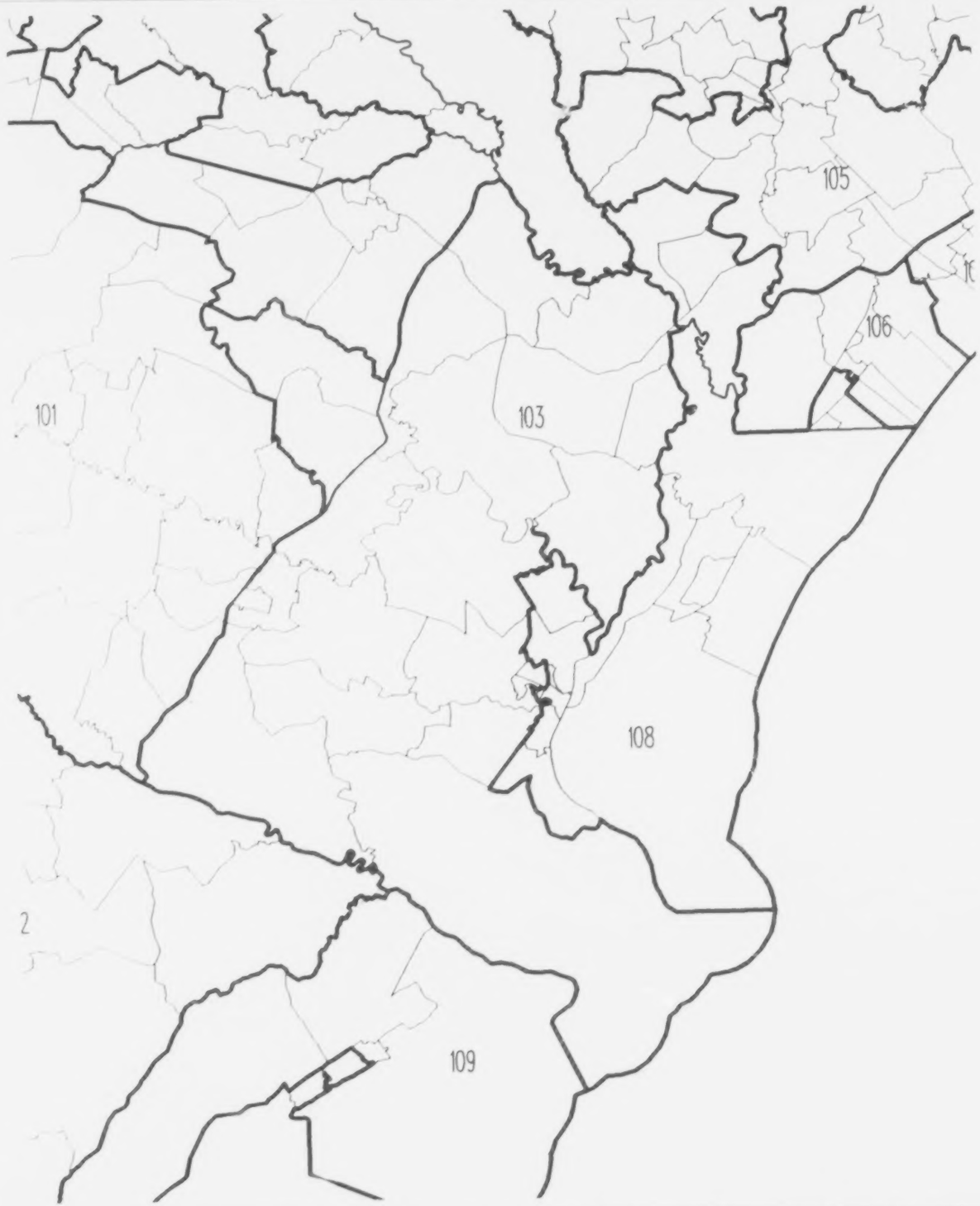

92
117
94
99
98
113
114
118
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112
110
115
FEDERAL COURT
HOUSE PLAN
Charleston
County
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 235854


Percentage of
Black Population
Charleston
County
< 30.0000
30.0000 - 49.9999
50.0000 - 59.9999
60.0000 - 79.9999
> 80.0000
July 1992
Scale 1 : 235854


GOVERNOR'S OFFICE
HOUSE PLAN
Charleston
County
109
112
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 265424


FEDERAL COURT
HOUSE PLAN
Charleston
County
109
DISTRICT BOUNDARY
COUNTY BOUNDARY
VTD BOUNDARY
JULY 1992
Scale 1 : 265424


Percentage of
Black Population
Charleston
County
< 30.0000
30.0000 - 49.9999
50.0000 - 59.9999
60.0000 - 79.9999
> 80.0000
July 1992
Scale 1 : 265424



GOVERNOR'S OFFICE

HOUSE PLAN

Georgetown County

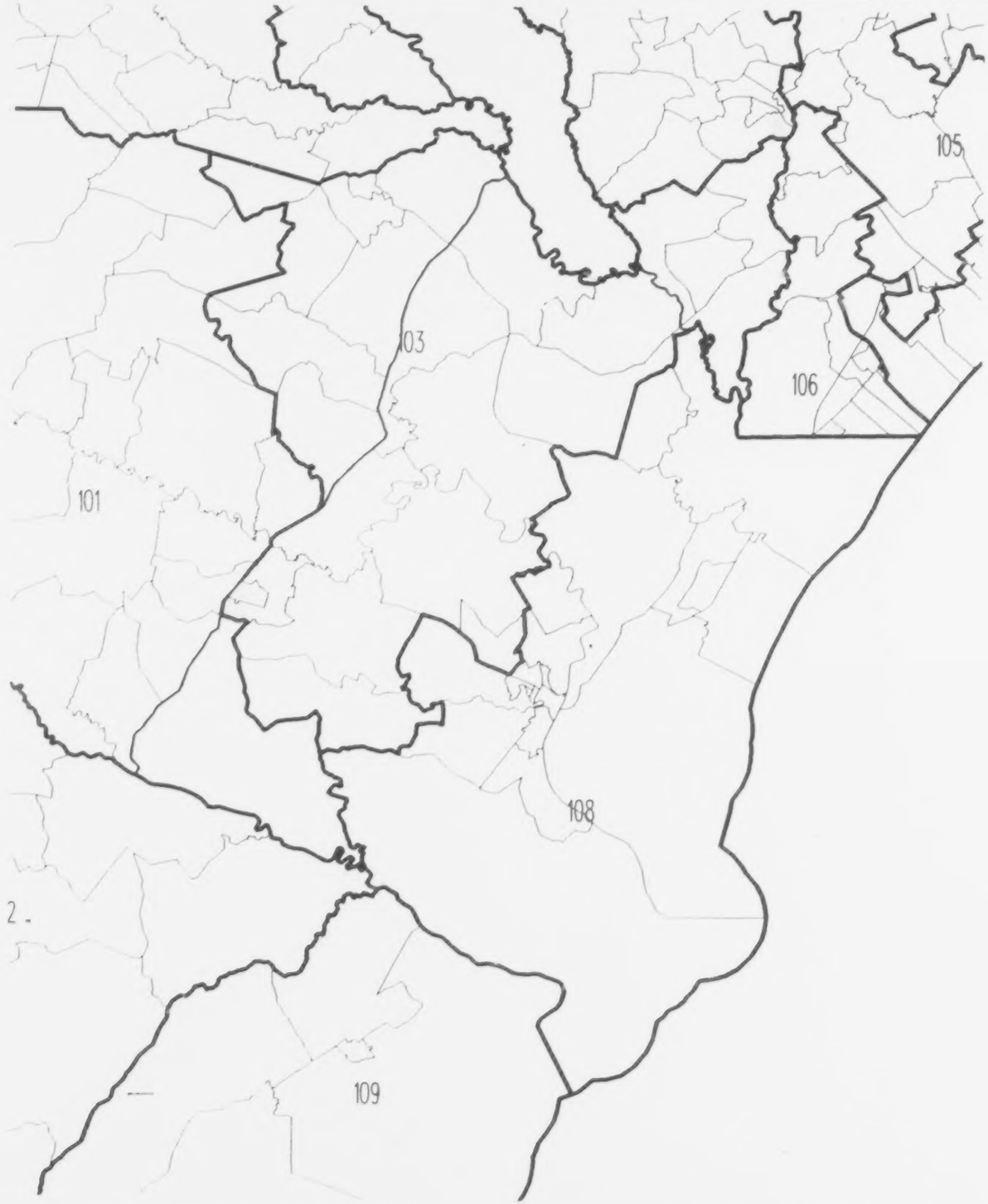
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COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

Scale 1 : 539012



FEDERAL COURT

HOUSE PLAN

Georgetown County

DISTRICT BOUNDARY

COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

Scale 1 :-539012



Percentage of

Black Population

Georgetown County

< 30.0000

30.0000 - 49.9999

50.0000 - 59.9999

60.0000 - 79.9999

> 80.0000

July 1992

Scale 1 : 539012



GOVERNOR'S OFFICE

HOUSE PLAN

McCormick
&
Greenwood
Counties

DISTRICT BOUNDARY

COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

Scale 1 : 529876



FEDERAL COURT

HOUSE PLAN

McCormick
&
Greenwood
Counties

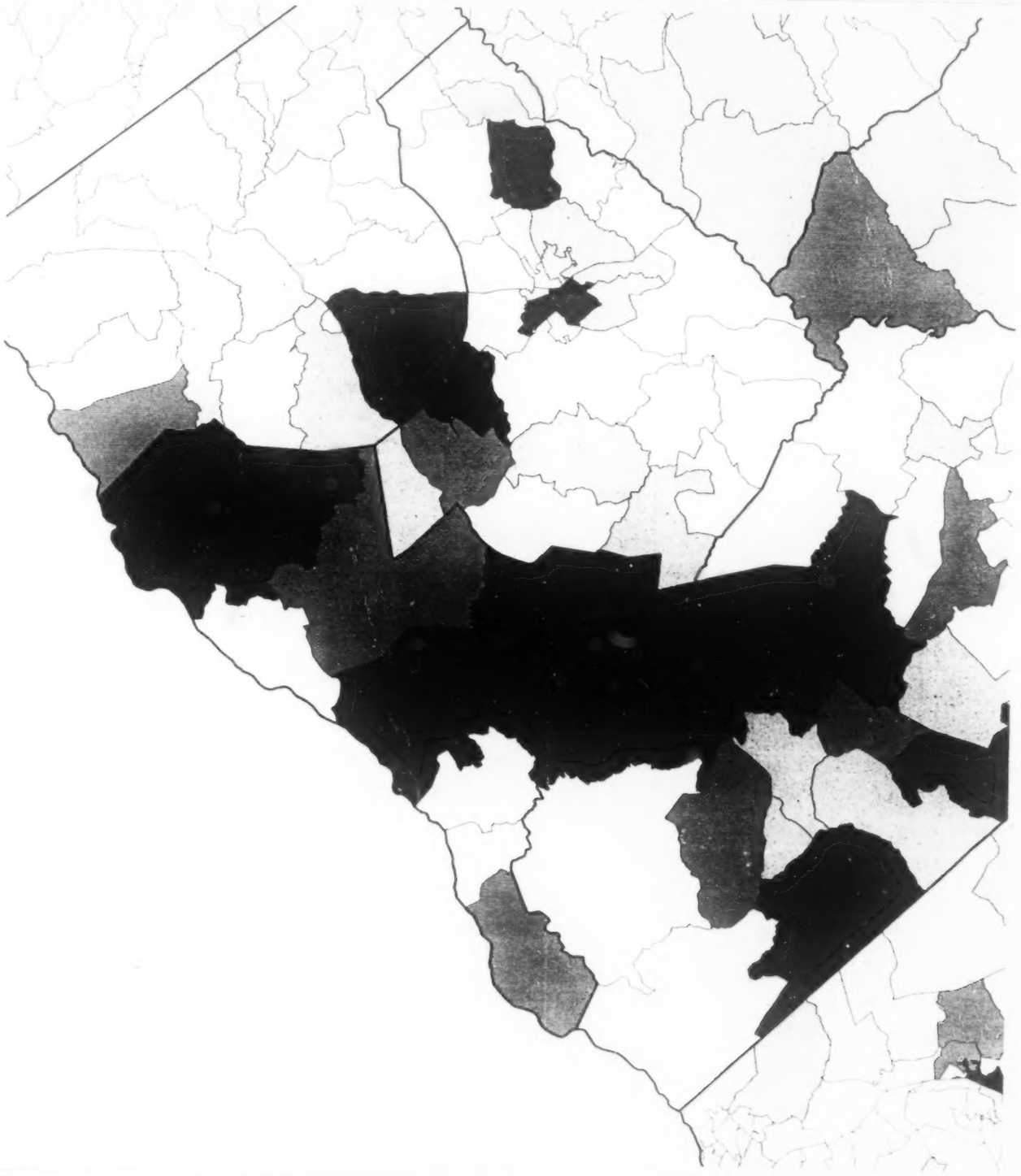
DISTRICT BOUNDARY

COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

Scale 1 : 529876



Percentage of

Black Population

McCormick & Greenwood Counties

< 30.0000

30.0000 - 49.9999

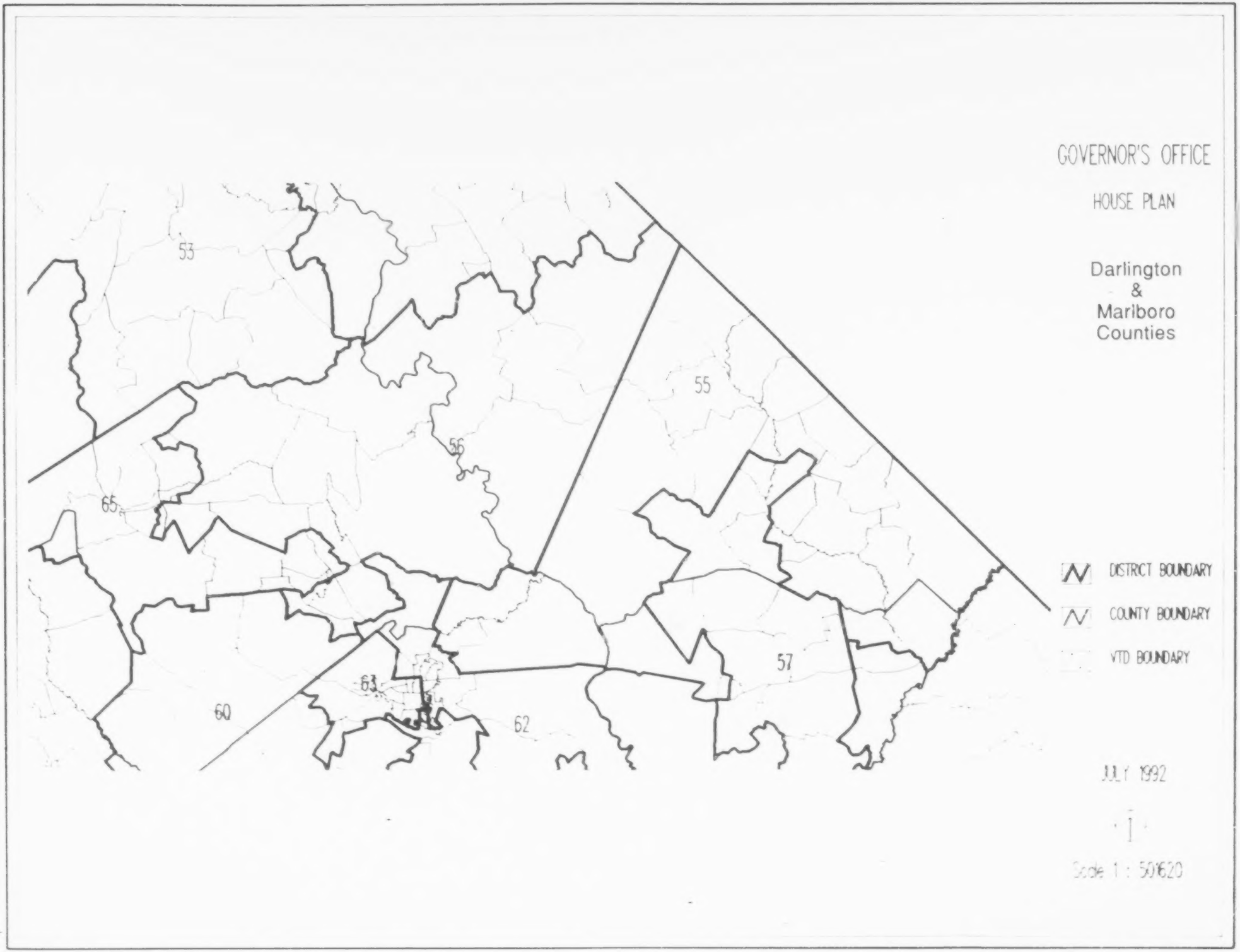
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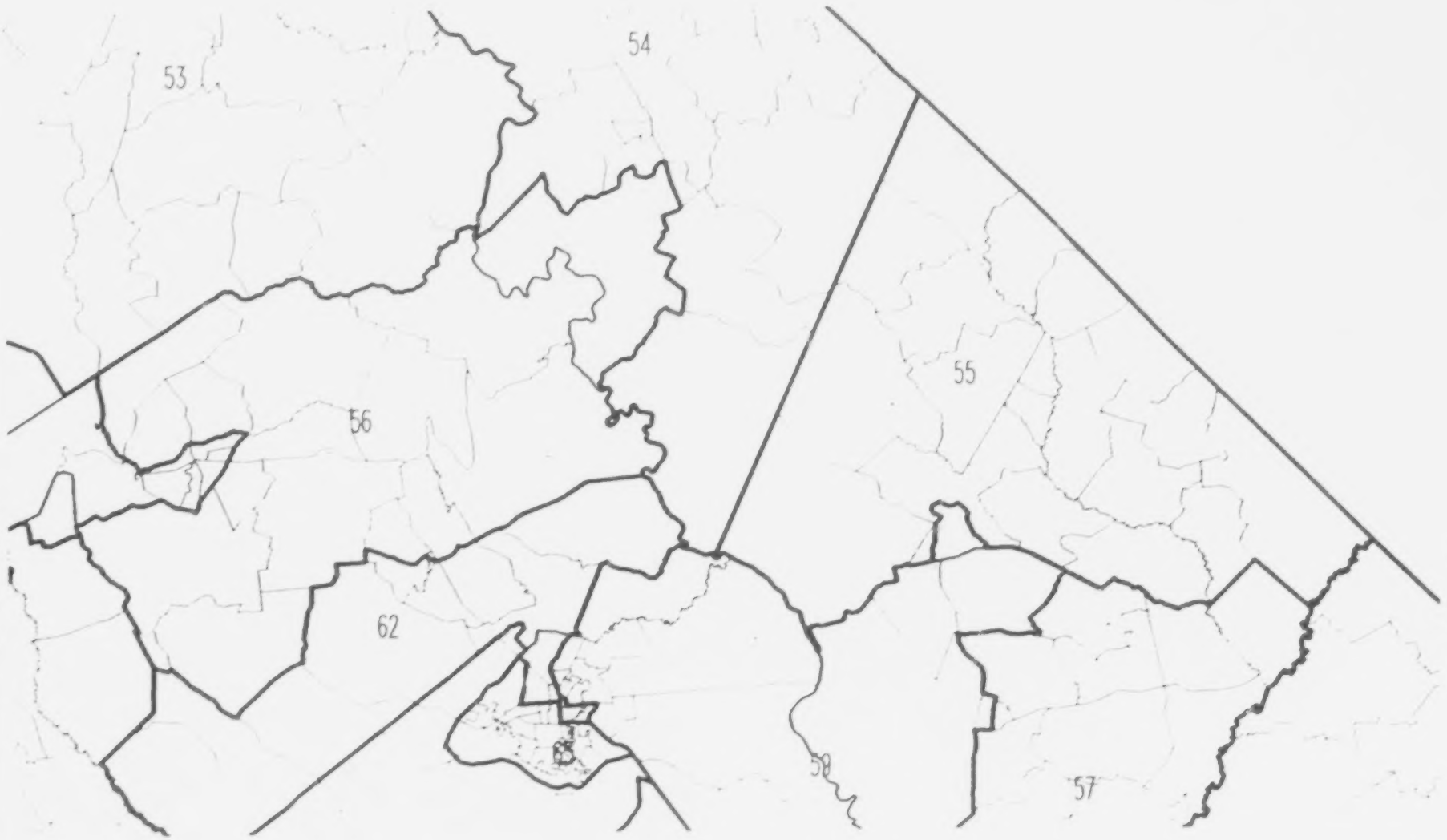
> 80.0000

July 1992

Scale 1 : 529876



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FEDERAL COURT

HOUSE PLAN

Darlington
&
Marlboro
Counties

DISTRICT BOUNDARY

COUNTY BOUNDARY

VTD BOUNDARY

JULY 1992

Scale 1 : 501620


Percentage of
Black Population
Darlington
&
Marlboro
Counties
< 30.0000
30.0000 - 49.9999
50.0000 - 59.9999
60.0000 - 79.9999
> 80.0000
July 1992
Scale 1 : 501620


Cherokee
Greenville
Spartanburg
York
Pickens
Oconee
Union
Chester
Lancaster
Chesterfield
Marlboro
Anderson
Laurens
Fairfield
Darlington
Dillon
Kershaw
Newberry
Lee
Marion
Abbeville
Greewood
Richland
Florence
Horry
Saluda
Sumter
McCormick
Lexington
Edgefield
Calhoun
Clarendon
Williamsburg
Aiken
Georgetown
Orangeburg
Berkeley
Barnwell
Bamberg
Dorchester
Allendale
Colleton
Hampton
Charleston
Jasper
Beaufort
SOUTH
CAROLINA

28 C.F.R. PART 51 - PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

§51.1 Purpose.

(a) Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General under section 5 and the interpretation of the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under section 5 and the interpretation of the Attorney General the responsibilities imposed on others under this section, the procedures in this part have been established to govern the administration of section 5.

* * * *

§ 51.54 Discriminatory Effect.

(a) *Retrogression.* A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer v. United States*, 425 U.S. 130, 140-42 (1976).

(b) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and,

except as provided in paragraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the condition existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to Section 5 review under § 51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction. See §51.18(c).

(4) Where at the time of submission of a change for Section 5 review there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

§ 51.55 Consistency with constitutional and statutory requirements.

(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive

effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

(b) *Section 2.* (1) Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.

(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold Section 5 preclearance.

FILED
OCT 1 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
1992 TERM

Nos. 92-155 and 92-219

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Appellants

v.

NICK THEODORE, et al.,

Appellees

CARROLL A. CAMPBELL, JR.,

Appellant

v.

NICK THEODORE, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM OF THE DEMOCRATIC PARTY OF SOUTH CAROLINA

Frank S. Holleman III
Wyche, Burgess, Freeman & Parham, P.A.
Post Office Box 728
44 East Camperdown Way
Greenville, South Carolina 29602
(803) 242-3131

Counsel of Record

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South Carolina State Conference of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982).. 4

Appellee Democratic Party of South Carolina ("Democratic Party") submits this motion to dismiss the above-captioned appeals, or, in the alternative, to affirm summarily the judgment of the Court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are included in the appendices to the jurisdictional statements filed by the Statewide Reapportionment Advisory Committee ("SRAC") (referred to herein as "App.") and by Carroll Campbell, Governor of South Carolina ("Governor"); other relevant provisions may be included in

the appendices to the motions to dismiss or affirm filed by other appellees.

INTRODUCTION

The Democratic Party was an intervenor and participated in the trial of the consolidated actions below. App. 8-9. The Democratic Party anticipates that the Lieutenant Governor, Speaker Sheheen, and the Senate of South Carolina will present the Court with extensive briefing as to why this appeal should be dismissed or, in the alternative, why the lower court's decision should be affirmed.

In this motion to dismiss or affirm, the Democratic Party sets forth three principal reasons why the appeals should be dismissed or the decision below should be affirmed: (1) the three-judge

District Court took extra steps to protect the voting rights of black South Carolinians, in difficult circumstances; (2) the District Court's decision provides for an interim plan only, a plan that this Court need not now review; (3) the District Court considered Section 2 of the Voting Rights Act in crafting its plan and thus addressed the concerns raised by the appellants in their jurisdictional statements.

ARGUMENT

1. The District Court protected the voting rights of black South Carolinians.

At the outset, it is important to recognize the point from which the District Court started. The districting plans in place as of 1990 were all plans that had been instituted by the federal

courts in the 1980's and/or precleared by the Justice Department under Section 5 of the Voting Rights Act. None had been successfully challenged under Section 2 of the Voting Rights Act.

The congressional districts in South Carolina were drawn in 1982 by the District Court as a result of litigation brought by the NAACP and were never challenged under Section 2. South Carolina State Conference of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982). App. 5-6.

A reapportionment plan for the state Senate was adopted by the District Court in 1984, Graham v. South Carolina, C.A. No. 3:84-1430-15 (Order of July 31, 1984), appeal dismissed, 53 U.S.L.W. 3483 (Jan. 7. 1985). The Legislature thereafter adopted a reapportionment plan, and it was precleared under Section

5 by the Justice Department. App. 5-6. The NAACP later brought a challenge to that plan under Section 2, but ultimately dismissed that action with prejudice. NAACP v. South Carolina, C.A. No. 3:84-2865-8 (D.S.C. Order of May 29, 1986). A Section 2 challenge was brought in 1988 to contest a special election in State Senate District 32; after a trial, the District Court found that black voters in that district had an equal opportunity to elect representatives, including the senator, of their choice and found no Section 2 violation. NAACP v. South Carolina Democratic Party, C.A. No. 3:88-2492-2 (D.S.C., Order of February 29, 1989), aff'd mem., 898 F.2d 146 (4th Cir. 1990).

A plan redistricting the state House was adopted by the Legislature in 1981, and it was precleared by the Justice

Department under Section 5. It was never challenged under Section 2. App. 6.

At the same time, during the 1980's, the black percentage of South Carolina's total population declined from 30.38% to 29.82%. App. 65. South Carolina's population shifted from urban and rural areas, where most of the black population resides, to suburban and resort areas. App. 66. Many of the majority black districts under the existing plans had declined dramatically in population or were much smaller than the ideal district size under the 1990 census. See App. 65-66 and n. 62; App. 70-71 and n. 69.

Despite the demographic changes, the District Court increased the number of majority black districts over those present under the plans created by the District Court or approved by the Justice Department during the 1980's. The

District Court drew a majority black congressional district, the first such district in recent South Carolina history. The Court refused to follow the disruptive and confusing plans offered by the appellants, drew its own majority black district while attempting to avoid disruptions of communities of interest and county lines, and successfully created a majority black district. App. 82-84. It is noteworthy that, despite the fact the Court rejected their plans, the appellants do not appear to direct their appeals at that aspect of the District Court's decision.

The District Court followed a similar course in drawing the state Senate and the state House districts. The Court rejected aspects of the plans offered by the appellants, which created serpentine, distended districts that

split small municipalities and stretched long distances or wound through several counties. At the same time, as compared with the plans established in the 1980's, the District Court created one additional Senate district with a black majority population and three additional Senate districts with a black majority voting age population. App. 67. In the state House, the District Court created two additional districts with a black majority population and three additional districts with a black majority voting age population. App. 72.

Finally, the District Court took these steps despite extensive evidence that, during the 1980's, black voters in South Carolina had had a great deal of success in electing candidates of their choice and had enjoyed a growing opportunity to participate in the

electoral process. Contrary to the suggestion of the SRAC, SRAC Juris. St. at 6, its evidence and that of the Republican Party and the Governor were extensively rebutted.

On cross-examination, experts for the plaintiffs had to admit that majority white electorates in South Carolina had elected a black sheriff, a black solicitor (South Carolina's equivalent of a district attorney), and numerous black county officeholders and school board members. Tr. of Dr. Ruoff's Testimony at 72-92, 95-96, 99 (February 19, 1992); Tr. of Dr. Ruoff's Testimony at 83 (February 27, 1992). Black state senators had been elected with substantial white support, while some white state senators had been elected in majority black districts with substantial black support and had admittedly been

extremely responsive to black concerns. Tr. of Dr. Arrington's Testimony at 20, 51 (February 21, 1992); NAACP v. Democratic Party, supra; Tr. of Dr. Ruoff's Testimony at 64-67 (February 19, 1992). A black state senator had overwhelmingly won the Democratic nomination for governor in 1990 against a white state senator in a primary electorate that was 57% white. The black senator had carried several majority white counties in the very areas where the plaintiffs were contending that blacks did not have an equal opportunity to participate in the electoral process. Tr. of Dr. Arrington's Testimony at 178-181, 232-234 (February 27, 1992); GOP Exhibit 94 at 83 and 85 (1990-1991 Annual Report of S.C. Election Commission); Democratic Party Exhibit 267; Tr. of Mr.

Ellisor's Testimony at 40-41 (February 25, 1992).

The plaintiff's expert also had to concede that the makeup of primary electorates resulted in black voters having substantial impact upon the outcomes of Democratic primaries and general elections, even when black citizens made up only 20 percent of the population. Tr. of Dr. Loewen's Testimony at 133-136 (February 19, 1992). This fact is particularly significant, because many of the contested areas were located in heavily Democratic areas.

Indeed, the evidence indicated that in some contested areas, the plaintiffs were complaining about polarization in partisan terms, rather than in racial terms. Tr. of Dr. Arrington's Testimony at 69-72 (February 21, 1992). In fact, in one contested area, the SRAC's expert

admitted, a black candidate who was a Republican got a majority of the white vote but a minority of the black vote, while a white candidate who was a Democrat received a majority of the black vote but a minority of the white vote. Tr. of Dr. Ruoff's Testimony at 84-86 (February 19, 1992).

At the same time, the direct evidence presented by the plaintiffs' experts was conspicuously weak. Some of the experts were ignorant of the facts of numerous elections in South Carolina. E.g., Tr. of Dr. Loewen's Testimony at 73-75, 130-132 (February 19, 1992); Tr. of Dr. Arrington's Testimony at 63, 69, 71 (February 21, 1992); Tr. of Dr. Ruoff's Testimony at 74-78 (February 27, 1992). One expert based his analysis almost entirely on elections that occurred prior to 1980; he based his

conclusion concerning racial polarization in the 1980's on elections in three state senate districts in 1984. Two of those seats were later won by black candidates who defeated white candidates, and one of those seats was the subject of a Section 2 challenge where the District Court expressly found that there was no Section 2 violation and that blacks in that district had an equal opportunity to elect representatives of their choice. Tr. of Dr. Loewen's Testimony at 73-75 (February 19, 1992); NAACP v. Democratic Party, supra; Tr. of Dr. Ruoff's Testimony at 65-66 (February 19, 1992); Tr. of Mr. River's Testimony at 147-148 (February 27, 1988). Another expert was extremely selective in his choice of elections; for example, he chose only 12 local primaries during the entire decade on which to base his conclusions, and 6

of those were located in only 3 districts. Tr. of Dr. Arrington's Testimony at 66-67 (February 21, 1992).

The selectivity of his approach was underscored by the fact that he based conclusions on a study of the outcome of the 1990 gubernatorial general election. That was an election in which the Democratic nominee, a black state senator, was challenging Gov. Carroll Campbell, an incumbent with high standing in the polls, millions of dollars in campaign funds, and the active support of the President. Tr. of Dr. Arrington's Testimony at 61 (February 21, 1992). At the same time, the expert did not consider the results of the Democratic primary, where the black Democratic nominee had overwhelmingly defeated another state senator, who was white, in a primary electorate that was 57% white.

Tr. of Dr. Arrington's Testimony at 68-69 (February 21, 1992). As one of the Judges commented during the trial concerning this testimony: "I have serious questions with his basis or his selectivity in statistics." Tr. of Dr. Arrington's Testimony at 179 (February 27, 1992).

Further, the evident weakness of the plaintiffs' evidence was underscored by the fact that the SRAC strenuously opposed the admission into evidence of an exhibit that presented a study of numerous elections in South Carolina -- an exhibit prepared by the SRAC's own expert and presented with an exhibit sticker to the defendants by the SRAC itself. Tr. of Dr. Ruoff's Testimony at 68-69, 93-95 (February 19, 1992). The elections surveyed by the SRAC expert included many where black candidates had

won in majority white districts or where white candidates had attracted sizeable black support. That exhibit, along with the admissions of the plaintiffs' experts on cross-examination, undermined the plaintiffs' claims that black voters in South Carolina during the 1980's and 1990's could participate equally in the electoral process only when extensively gerrymandered, supermajority black districts were created.

In sum, the District Court went further than the evidence required in order to design districting plans that recognized and furthered the voting rights of black South Carolinians. The appellants' only complaint is that the District Court did not adopt wholesale their extreme plans containing districts that were gerrymandered with only the appellants' aims in mind.

2. Review by this Court now is premature and unnecessary, because the District Court adopted only an interim plan.

The District Court's decision put in place only an interim plan. It is subject to change by the Legislature, and any legislative plan will be subject to Section 5 review. As explained above, in 1984 the Legislature adopted a state Senate plan that was reviewed under Section 5 after a court-ordered interim plan had been issued.

As important, an interested party with standing is free to bring an appropriate Section 2 challenge to the interim plan after the 1992 elections. Democratic and Republican primaries have been held under the new plan, and the general election is only a month away. The District Court was careful to provide that its Order did not have res judicata

effect. App. 42. Any appropriate Section 2 challenge in the future will have the benefit of complete discovery, the results of the 1992 elections, and a trial presenting extensive evidence under Section 2 in light of actual election returns. Review by this Court now is not only a waste of this Court's resources, it would be premature until a full Section 2 challenge is before the Court.

3. The District Court took Section 2 into account.

In fact, the District Court spent a substantial portion of its opinion explaining Section 2 concerns and detailing how it took them into account. App. 31-57. The District Court was faced with the exigencies of crafting an interim redistricting plan in time for summer primaries and a fall general

election. In fact, the Court had already postponed the filing dates, which had been scheduled for March and April, until June and the primary date, which had been scheduled for early June, until August 25. Because of the legislative timetable and the Governor's veto, the Court had very little time to deal with the complexities of redrawing the entire state for all three plans. Nevertheless, the Court expressly drew its plan to comply with the basic requirements of Section 2. App. 45-47; 56-57. The Court merely recognized the limitations of time and the unavoidable fact that it had to apply Section 2 in designing electoral maps that had not yet been put in place, rather than in reviewing an existing electoral map with the benefit of actual election results and a history of political campaigns.

In reality, the appellants are complaining that the Court gave interested parties two chances to present Section 2 issues to the federal courts. The District Court let the appellants present all the evidence they brought forward that bore on Section 2; none of the appellants' proffered evidence was excluded. The Court considered all that evidence in drawing the interim plans. In a subsequent Section 2 challenge, appropriate parties also can present whatever admissible evidence they may want a Court to consider. The District Court has done everything possible to ensure that reapportionment in South Carolina has the maximum possible review under Section 2.

CONCLUSION

There are no substantial issues presented by these appeals. The District Court protected the voting rights of black South Carolinians; the District Court fashioned interim plans only, plans that are subject to subsequent judicial challenge and/or legislative revision; and the District Court applied Section 2 in designing its plans. Any further action by this Court now would be unnecessarily disruptive and waste the time and resources of this Court and the litigants.

Therefore, the Democratic Party asks that the Court dismiss the appeals or, in the alternative, summarily affirm the District Court's judgment.

Respectfully submitted,

WYCHE, BURGESS, FREEMAN
& PARHAM, P.A.

By: 

Frank S. Holleman III
P.O. Box 728
Greenville, SC 29602
(803) 242-3131

Counsel for the Democratic
Party of South Carolina

September 30, 1992

Greenville, South Carolina

(4) (3)

Nos. 92-155 and 92-219

FILED
OCT 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR.,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

MOTION OF APPELLEE LIEUTENANT GOVERNOR NICK THEODORE TO DISMISS OR AFFIRM

JOHN C. MOYLAN, III
(Counsel of Record)
OFFICE OF THE LIEUTENANT GOVERNOR
P.O. Box 142
Columbia, SC 29202
(803) 734-2080

TERRELL L. GLENN
BLANEY A. COSKREY, III
GLENN, IRVIN, MURPHY GRAY & STEPP
1510 Calhoun Street
P.O. Box 1550
Columbia, SC 29202
(803) 765-1100

WILLIAM R. STEIN
MARK H. DUESENBERG
HUGHES HUBBARD & REED
1300 I Street, N.W.
Suite 900 West
Washington, D.C. 20005
(202) 408-3600
Attorneys for Lieutenant Governor Nick Theodore

October 1992

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QUESTIONS PRESENTED

1. Is this appeal from the three-judge district court's order fashioning interim redistricting plans moot when the election for which the plans were fashioned has taken place and the state legislature has an opportunity to enact its own plans in the two to four years before the next elections take place?

2. Should this Court summarily affirm the district court's interim redistricting plans for a state legislature when (a) the plans previously in effect were approved by the Justice Department and the courts as consistent with the Voting Rights Act and (b) although the black percentage of the state's population has declined since the previous plans were approved, the district court's plans enhance the opportunity for black citizens to participate in the political process and elect representatives of their choice by increasing the number of black majority districts as well as the concentration of black citizens within many of those districts?

3. Did the district court abuse its discretion in formulating, in time for impending elections, interim redistricting plans for a state legislature that (a) contain only *de minimis* variation from population equality, (b) do not diminish, and in fact enhance, minority voting opportunity from the plans previously in effect, (c) apply the substantive standards of both Sections 2 and 5 of the Voting Rights Act, and (d) honor well-established state policies of respecting county lines and political subdivisions, preserving communities of interest through geographical compactness and contiguity, and maintaining constituent-representative relations?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-155 and 92-219

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR.,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

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MOTION OF APPELLEE LIEUTENANT GOVERNOR NICK THEODORE TO DISMISS OR AFFIRM

Appellee Nick Theodore, Lieutenant Governor of the State of South Carolina ("Lieutenant Governor"), submits this motion to dismiss the above-captioned appeals or, in the alternative, to affirm summarily the judgment of the court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are included in the appendices to the jurisdictional statements filed by the Statewide Reapportionment Advisory Com-

mittee ("SRAC") and by Carroll Campbell, the Governor of South Carolina ("Governor"). (The appendix to SRAC's Jurisdictional Statement is referred to herein as "App.")

STATEMENT OF THE CASE

A. *Introduction*

These cases are appeals from the order of a three-judge district court implementing judicially-fashioned, interim redistricting plans for the South Carolina General Assembly. The 1990 census revealed that South Carolina's existing legislative districts no longer were constitutionally permissible under the "one-person, one-vote" principle. The General Assembly embarked on the task of redistricting, but the political process became deadlocked. The three-judge district court concluded that, as a result of the legislative impasse, "no plans could be enacted and properly precleared through the United States Department of Justice in time to hold regularly scheduled elections." App. 14. In order to assure that constitutional elections can be held in 1992—when the entire General Assembly is up for re-election—the three-judge court, rejecting the various plans proposed by the parties, formulated and imposed its own redistricting plans "as an interim remedy." App. 12.

B. *The Legislative Districts Existing In 1990*

The South Carolina General Assembly is divided into a 46-member Senate and a 124-member House of Representatives ("House"). Senators are elected to four-year terms and House members are elected to two-year terms. S.C. Const. art. III, §§ 2, 3, 6. The General Assembly was last redistricted in the wake of the 1980 census.

The existing boundaries of the House districts were enacted into law by the General Assembly in 1981 and were precleared by the Justice Department under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988) ("Act"), in time for the 1982 House election. The 1981 House redistricting plan has never been challenged under Section 2 of the Act, 42 U.S.C. § 1973 (1988), and re-

mained in effect through the most recent House election in 1990. App. 70.

In 1983 the General Assembly enacted a Senate redistricting plan, and the State of South Carolina filed a declaratory judgment action in the United States District Court for the District of Columbia seeking preclearance under Section 5. *South Carolina v. United States*, 589 F. Supp. 757 (D.D.C. 1984). When it became apparent that the District of Columbia court could not act in time for the 1984 Senate election, a three-judge district court in South Carolina formulated and imposed an interim redistricting plan. *Graham v. South Carolina*, Civ. No. 3:84-1430-15 (D.S.C. July 31, 1984), *appeal dismissed for lack of jurisdiction sub nom., NAACP v. Daniel*, 469 U.S. 1101 (1985). Subsequent to the court's order, the General Assembly adopted and the Governor signed into law a legislative redistricting plan for the Senate. This plan was then precleared by the Justice Department. Accordingly, the three-judge court vacated its interim plan and the legislative plan went into effect. *Id.*, Order filed August 13, 1984. In November 1984, an action was filed challenging the legislatively-enacted Senate plan under Section 2 on a state-wide basis; the plaintiffs consented, however, to dismissal of the complaint with prejudice. *NAACP v. South Carolina*, Civ. No. 3:84-2865-8 (D.S.C. May 29, 1986).[1] The 1984 Senate plan thus remained in effect through the most recent Senate election in 1988.[2]

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[1] In addition, a Section 2 action was instituted challenging a special election in one of the black majority Senate districts established in the 1984 legislative plan. After a full bench trial, the district court ruled that Section 2 had not been violated, and the Fourth Circuit affirmed. *NAACP v. South Carolina Democratic Party*, Civ. No. 3:88-2492-2 (D.S.C. Feb. 29, 1989), *aff'd mem.*, 898 F.2d 146 (5th Cir. 1990).

[2] In March 1982, a three-judge district court drew interim Congressional districts in time for the 1982 election. *South Carolina State Conf. of Branches of NAACP v. Riley*, 533 F. Supp. 1178 (D.S.C. 1982). The General Assembly never passed its own plan and the court's plan remained in effect for subsequent congressional elections through 1990. App. 6.

At the time the 1984 Senate plan was put into effect, the majority of total population ("TOP") in ten of the 46 Senate districts was black, with those majorities ranging from 50.23% to 63.24% of total population. The majority of voting age population ("VAP") in seven of those Senate districts was black, ranging from 50.53% to 59.15%. Under the 1981 House plan, 26 of the 124 legislative districts had black majorities of total population (ranging from 50.12% to 73.64%), and 20 districts had black majorities of voting age population (ranging from 51.23% to 68.88%). App. 27-28 n.34.

C. *The Redistricting Process After The 1990 Census*

The 1990 census, issued in March 1991, reflected an increase in South Carolina's total population from 1980 to 1990, as well as a shifting of population within the state. App. 6. The total number of black South Carolinians increased, but the black percentage of total population decreased from 30.38% in 1980 to 29.82% in 1990. App. 65. The black percentage of voting age population also decreased, from 27.3% to 26.9%. SRAC Juris. St. at 5. The ten black majority Senate districts experienced a net loss in population due to these demographic changes. App. 65-66. The number of black majority TOP House districts decreased, for the same reasons, from its original 26 to 24, although the number of black majority VAP districts increased from 20 to 21. App. 71.[3] The district court found that these "demographic changes in South Carolina's majority black districts are wholly unrelated to the representation provided" or other racial issues. App. 66. Rather, "the changes are indicative of a general movement away from urban and rural areas to suburban and resort areas." *Id.*

The 1990 census also demonstrated that the House and Senate districts had become unconstitutionally mal-

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[3] The term "black majority TOP district" refers to a district where the majority of the total population is black. The term "black majority VAP district" refers to a district where the majority of the voting age population is black.

apportioned. Using 1990 census data, the 1984 Senate plan was shown to have a total deviation from the ideal population of 63.15%, and the 1981 House plan a total deviation of 113.86%. The 1982 Congressional plan had a total deviation of 8.33%. App. 6 & n. 13. Accordingly, the General Assembly began an effort to pass redistricting legislation. It was unable to do so during the 1990-91 Legislative Session, which adjourned *sine die* on June 6, 1991. App. 7.

D. *Proceedings In The District Court*

On October 4, 1991, the Republican Party filed a complaint alleging deadlock in the South Carolina General Assembly and requesting the court to reapportion the South Carolina Senate, House, and Congressional districts. *Burton v. Sheheen*, Civ. No. 3:91-2983-1 (D.S.C.). On October 31, 1991, SRAC filed a similar complaint. *SRAC v. Campbell*, Civ. No. 3:91-3310-1 (D.S.C.).[4] A three-judge court was designated pursuant to 28 U.S.C. § 2284 (1988), and the cases were consolidated.[5]

Motions were filed, claiming that judicial intervention was not yet warranted because the General Assembly might yet successfully enact redistricting plans when the

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[4] The defendants in these cases included the Governor, Lieutenant Governor (who is President of the Senate), the Speaker of the House, and the Executive Director of the Election Commission. The state Senate, the Democratic Party and various individuals (in private and governmental capacities) were subsequently permitted to intervene as parties or participate as *amicus curiae*.

[5] A third case, *Blanton v. Campbell*, Civ. No. 2:91-3635-1 (D.S.C.), primarily involved allegations that the South Carolina county delegation system of government violated the United States Constitution and the Voting Rights Act. That case was consolidated with the other two. *See* App. 9 & n.20. The issues not disposed of by the three-judge court were deconsolidated by the court in its May 1, 1992 order and assigned to a single district judge for resolution. Issues regarding the county delegation process are not involved in the instant appeals.

legislature reconvened in January 1992. App. 10. In fact, upon reconvening, the General Assembly did pass House and Senate redistricting plans. On January 29, 1992, however, the Governor vetoed both plans, and the vetoes were sustained. App. 10-11. The court then set the case for trial beginning February 18, 1992. App. 11.

At trial, the parties stipulated that population shifts as reflected by the 1990 census had resulted in unconstitutional malapportionment of the existing districts. All parties agreed that as a result of such malapportionment, those plans should not and could not be implemented for the upcoming elections. Instead, the parties presented their own proposed plans. Confronted with the complexity of the parties' computer-generated plans and the likelihood of being required to draw its own plans, the court appointed as technical advisor to the court the Director of the Division of Research and Statistical Services of the State Budget and Control Board.

The court received evidence in three phases relating, respectively, to the Senate, House, and Congressional plans. In order to expedite the proceeding, expert testimony received in one trial was allowed to be incorporated by reference in subsequent trials. During the first day of testimony, the court expressed concern over the relevance of the evidence being presented by SRAC and the Republican Party relating principally to the history of discriminatory voting practices in South Carolina. The court requested the parties to address the relevance of Section 2 to the issues in the case. Nonetheless, the court heard or admitted evidence on all the points on which plaintiffs wished to introduce evidence.

The facts on which the court based its conclusion were extensive and vigorously disputed by the parties in live testimony, including conflicting and hotly contested expert testimony. Although SRAC contends that "[t]he evidence of political cohesiveness and racial block voting was extensive, and was unrebutted," SRAC Juris. St. at 6, in fact, the testimony of plaintiffs' "experts" was

shown on cross examination to be highly selective and misleading. One of their statistical experts admitted, for example, that his analysis ended with elections in 1984 and that he was unaware of the many examples cited to him of black candidates' successes in elections after that year. Tr. at 10, 73-77 (testimony of James W. Loewen, Feb. 19, 1992). Moreover, his testimony regarding Senate districts was based largely on multi-member districts, since 1984 was the first year in which Senate elections made use of single-member districts. *Id.* at 58-59. Another of plaintiffs' statistician's data were shown to be misleading in the use of selective rounding of numbers to arrive at nonexistent and meaningless distinctions among the plans. Tr. at 46-47, 54-55 (testimony of Theodore S. Arrington, Feb. 21, 1992). He too admitted that his figures did not reflect the many examples of black electoral success that undermined his conclusions. *Id.* at 63-69. In fact, the evidence was replete with instances of black electoral successes, including successes in majority white districts, as well as instances of white electoral successes in majority black districts.[6] The court made clear from the bench that even if it treated Section 2 in the manner urged by SRAC and the Republican Party, the proof offered by their experts fell far short of meeting their burden.

E. *The District Court's Analysis*

The three-judge court concluded that none of the redistricting plans proposed by the parties "fully comports with the objectives and criteria which should be incorporated in a judicially approved plan." App. 12. The court thus drew its own plans "as an interim remedy." *Id.* In fashioning its plans, the court observed that redistricting is, "first and foremost, a state legislative responsibility rather than a federal judicial task." App. 13. The court thus recognized that it "possesses no distinctive mandate to com-

[6] A more detailed discussion of the evidence relating to black electoral successes and expert testimony, including examples of the inadequacies of appellants' expert witness' testimony, is contained in the Motion To Dismiss or Affirm filed in this case by the Democratic Party of South Carolina.

promise potentially conflicting state redistricting policies in the people's name," and that it must therefore try to achieve the goal of population equality with only *de minimis* variation. App. 20. For the same reason, the court ruled that "in fashioning interim relief where state political actors have failed to produce redistricting plans, this court . . . 'should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" App. 14 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)).

In formulating its interim plans, the court gave principal consideration to the requirements and standards of the Voting Rights Act. The court noted that Section 5 and its preclearance requirement did not directly apply because the court was drawing its own plans. The court recognized, however, that it must consider whether its plans have a discriminatory or "retrogressive" effect, *i.e.*, whether the plans cause a diminution in minority voting opportunity from what it had been under the previous plans. App. 26. In making this determination, the court applied the case law and Justice Department regulations under Section 5. *See* App. 25-31, 39-42.[7]

The court also considered Section 2 of the Act. The court held that while it was not required to "completely graft the tests and requirements of § 2, including the searching evidentiary requirements," to its formulation of an interim plan, it nonetheless should adopt a plan that "comport[s] with the standards and guidelines of § 2," including those set out in *Thornburg v. Gingles*, 478 U.S.

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[7] For example, the district court looked to the principles developed in *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Upham v. Seamon*, 456 U.S. 37 (1982); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Beer v. United States*, 425 U.S. 130 (1976); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); various other Supreme Court and lower court cases; and the Justice Department preclearance regulations, 28 C.F.R. Part 51 (1991).

30 (1986), and its lower court progeny. App. 38. *See* App. 31-57. The court explained that,

> with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind, we have analyzed the proposed plans as well as the plans we adopt today based on the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart*; 2) the extent to which reasonable [sic] compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina. . . . This approach allows the court to formulate a plan which is consistent not only with the provisions of § 5, but insures that the court's plan will not violate the threshold requirements for liability under § 2.

App. 46-47.

Finally, the court emphasized that "[u]nlike the parties," it "is not free to impose a particular political or racial agenda upon the state. The court must, as a court of equity, remedy the constitutional deficiencies of the current plan with due deference for state policies." App. 75 (footnote omitted). The court thus formulated a redistricting plan that it found

> achieves the proper balance between drawing districts of equal population, recognizing concentrations of black voters, and giving effect to current state policy respecting the redistricting process and avoiding the "political thicket" that arises in pitting large numbers of incumbents against one another.

Id.

F. *The District Court's Interim Plans*

1. *Senate.* The court's plan for Senate districts has a total population deviation of 1.95%, which the court

found to be *de minimis*. App. 61. Looking to the state policy of respecting county lines, the court's plan contains only 30 "excess" county-line cuts.[8] Similarly, the court's plan splits only 49 precinct lines, thereby minimizing voter confusion and administrative inconvenience. App. 63-64.

The court's plan demonstrably improves minority political opportunity in light of the intervening population shifts. Even though the black percentage of total population and voting age population had decreased in South Carolina during the previous decade, the interim plan *increases* the number of black majority TOP and VAP districts:

	Court Plan	1984 Plan / 1980 Census Data	1984 Plan / 1990 Census Data
Black Majority TOP Districts	11	10	10
Black Majority VAP Districts	10	7	9

Similarly, black population concentrations—in terms of black percentage of both TOP and VAP—increase in most of those districts. *See* App. 66-68.

The court rejected all the plans proposed by the parties, including the Governor, the Lieutenant Governor, SRAC, the Republican Party and the Senate. The court found, for example, that the plans proposed by the Governor and Republican Party, while having insignificantly lower population deviations than the court's plan, did not respect county lines (52 and 56 excess cuts versus 30 under the court's plan) or precinct lines (122 and 144 cuts versus 49 under the court's plan). App. 61-64. One Republican-proposed district, for example, stretched for 100 miles, cutting into seven counties, and included disparate urban and rural communities. App. 63-64. Thus, the court found that its plan achieved compactness and contiguity and protected the state's established communi-

[8] "Excess" county cuts are those which are not necessary to meet population equality requirements. *See* App. 62-63.

ties of interest better than the other proposed plans. App. 63.

2. *House.* The court's House redistricting plan has a total population deviation of 1.98%. App. 72. Again, the plan increases the number of black majority districts, despite the decrease in relative black population:

	Court Plan	1981 Plan/ 1980 Census Data	1981 Plan/ 1990 Census Data
Black Majority TOP Districts	28	26	24
Black Majority VAP Districts	23	20	21

The percentage black TOP and VAP majorities under the court's interim plan are higher in many districts than under the 1981 plan. App. 71. The court's plan honors state policy by limiting the number of excess county cuts to 20. App. 73.

Again, the court rejected all party-proposed plans. In particular, the court rejected SRAC's, the Republican Party's and the Governor's proposed House plans because, while those plans created a greater number of black majority districts, they did so by "throw[ing] all consideration of state policy of recognizing county lines to the wind," *id.*, and by flouting the requirements of compactness and contiguity. One SRAC-proposed district, for example, "[w]ith no apparent purpose other than capturing as many black persons . . . as possible . . . starts near the northwestern corner of [Horry] county and runs in a thin, snaking line back and forth across the county, ending at the southern end of the county." App. 78. One Republican-proposed district was composed of "fractions of three counties and three towns," with "no demonstrated cohesiveness." App. 77. The court found that appellants "seek[] the imprimatur of the court upon the elimination of house incumbents to suit the sponsoring party's political purpose, *i.e.*, the Republican Party and the Governor appear to seek to eliminate

Democrats and the SRAC appears to seek to eliminate incumbents because of their race." App. 74.

3. *Congress.* The court's interim plan for South Carolina's six Congressional districts has a total population deviation of zero, and splits only 13 counties. App. 81, 84. The plan also creates a black majority district, unlike the old 1982 plan. App. 82-83. The court's Congressional plan is not being challenged in the present appeals.

ARGUMENT

I. THE APPEALS SHOULD BE DISMISSED AS MOOT BECAUSE THE ELECTION WILL HAVE TAKEN PLACE BEFORE THIS COURT CAN REVIEW THE CASE

These appeals are from an interim order establishing legislative districts for the purpose of the 1992 elections and until the South Carolina legislature adopts approved redistricting plans. The primary election was conducted on August 25, 1992, using the district court's redistricting plans. The general election is scheduled for November 3, 1992. Significantly, the appellants have not sought to stay the election or to expedite these appeals. If the Court were to note probable jurisdiction, briefing and argument in the case would not be completed until well into 1993, and the case would not likely be decided until the Spring of 1993. Under such circumstances, where the requested relief would be moot when rendered, dismissal is appropriate.

1. The district court clearly intended its plans to function solely as interim measures, stating that "[i]t is our hope that the General Assembly and the Governor will work together and fashion acceptable plans. In the interim, these are the plans for the South Carolina Senate, House of Representatives and the United States Congressional Districts." App. 85-86. Because the disputed plans are designed only for two elections, one past and one to occur even before briefing in this case is complete, this Court should not expend its limited resources crafting a decision that may have no practical effect. This Court

in the past, when faced with the necessity of deciding appeals regarding an election after the disputed election has been conducted, has concluded that the issue is moot and dismissed the cases. *See, e.g., Harris v. City of Birmingham*, 112 S. Ct. 2896 (1992) (mem.), *vacating as moot, Greene County Racing Comm'n v. City of Birmingham*, 772 F. Supp. 1207 (1991); *Watkins v. Mabus*, 112 S. Ct. 412 (1991) (mem.) *aff'g in part, vacating as moot in part*, 771 F. Supp. 789 (S.D. Miss.); *Illinois State Bd. of Elections v. Socialist Workers*, 440 U.S. 173, 187-88 (1979).

This is not a case where it is "reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). *See DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974). If history is any guide, South Carolina may well enact legislative plans, which would be subject to challenge under Sections 2 and 5 of the Act. In 1984, for example, shortly after the district court imposed an interim redistricting plan for the Senate, the General Assembly enacted a plan for the Senate, which the Governor promptly signed and the Justice Department precleared. *See* p. 3, *supra*. If legislative plans are implemented, they will replace the district court's interim plans at issue in this case, and this Court's review of the interim plans will have been futile and of no practical consequence: an advisory opinion. Those legislative plans, of course, would be subject to challenge under Section 2—as, indeed, the 1984 legislative Senate plan was challenged (albeit unsuccessfully) under Section 2. *See* p. 3, *supra*.

Alternatively, if it becomes apparent as the 1994 House elections and 1996 Senate elections approach that the political process remains deadlocked, a timely challenge can then be brought to the district court's plans, which at that time will no longer be "interim." Such a challenge would have the benefit of concrete, district-by-district evidence derived from the 1992 election regarding racial polarization, political cohesiveness and other Section 2

factors. *See Gingles*, 478 U.S. at 59, 80 (analysis of vote dilution must be district specific). At the present time, by contrast, the evidence on these issues necessarily is abstract and speculative.

If the legislature enacts its own plans, or if any voting rights deficiency in the district court's plans emerges from the 1992 election, "there is no reason to suppose" that a future Section 2 challenge to redistricting in South Carolina "will not come with relative speed to this Court." *DeFunis*, 416 U.S. at 319.

2. In addition to the usual constitutional and prudential concerns that are raised by a claim of mootness, another factor should play an important role in the Court's decision. This Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539 (citing *Connor v. Finch*, 431 U.S. 407, 414-15 (1977)); *see also McDaniel*, 452 U.S. at 138; *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Although the district court found it necessary to impose court-ordered redistricting plans for the 1992 election, it noted that "this court was called upon to perform a task that all concede is most properly a legislative one." App. 85.

Therefore, the General Assembly, as newly constituted after the November election, and the Governor should be accorded the opportunity to draft constitutional redistricting plans, as they did in 1984 subsequent to the court's imposition of an interim plan. Certainly this Court, in the absence of a request from appellants for exigent relief, should avoid the "political thicket" of the redistricting process unless and until it must.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE APPEAL PRESENTS NO SUBSTANTIAL ISSUES

Apart from the procedural reasons to dismiss, it is apparent that plenary review is unwarranted on the facts presented, and that affirmance on the merits would be

appropriate. The district court's interim plans raise no significant issues of racial voting equity—the interest at the core of Voting Rights Act litigation. In fact, the district court's plans so clearly protect minority voting rights that this Court should endeavor to dispose of these appeals before November 3 so as to remove from the election any cloud of the claims of racial unfairness.

Under this Court's precedents, the district court's interim plans must be viewed against South Carolina's districting plans in effect immediately prior to the implementation of the court's plans. *City of Lockhart*, 460 U.S. at 132, 134; *see Beer*, 425 U.S. at 141-42; *Perkins v. Matthews*, 400 U.S. 379, 394 (1971); *see also* 28 C.F.R. § 51.54(b)(1) (1991). The three-judge court's plans in this case *increase* the voting strength of South Carolina's black population compared to the districting plans previously in effect—plans that were federally approved as consistent with the Voting Rights Act under the 1980 census figures.[9] Given that the number of blacks as a percentage of South Carolina's total and voting age population has declined since the previous plans were implemented, *see* p. 4, *supra*, it cannot credibly be argued that the court's interim plans violate the Act.

The Senate and House districting plans implemented after the 1980 census were found, at the time of implementation, to comply with the Constitution and the Voting Rights Act. The 1981 House plan and 1984 Senate plan both were precleared by the Department as consistent with Section 5. The Justice Department said, in approv-

[9] The effectiveness of the district court's interim plans in protecting minority electoral opportunities was confirmed in the June primary elections. Black candidates were elected in 18 House districts, and 15 of these candidates are running unopposed in the November elections. Black candidates were elected in 7 Senate districts, and 6 of these candidates are running unopposed. Office of the Clerk, South Carolina House of Representatives, *Blacks Offering for Election to the General Assembly* (1992-93). Presently, there are 14 blacks serving in the House and 6 serving in the Senate. Office of the Clerk, South Carolina House of Representatives, *Legislative Black Caucus* (Feb. 1, 1992).

ing the Senate plan, that the plan "will afford to black citizens a fair opportunity to participate in the political process and elect candidates of their choice to office." Letter from Department of Justice dated August 10, 1984 (attached to order of August 13, 1984 in *Graham*). This language, of course, tracks the requirements of Section 2. No successful Section 2 judicial challenges have been made to these state-wide plans in the decade they have been in effect. To the contrary: the only two Section 2 challenges to the Senate plan were decidedly unsuccessful, one having been abandoned by the plaintiffs and one having been rejected by the courts. *See* p. 3 & n.1, *supra*.

Against this background of districting plans that had been established as lawful under the 1980 census, the three-judge court created interim plans that enhanced minority voting opportunity despite the population shifts that reduced the minority proportion of the state's population. Yet, the district court's interim plans increase, as compared to the prior plans, both the number of majority-black TOP and VAP Senate and House districts, *see* pp. 10-11, *supra*, and the average minority concentration of the Senate districts.[10]

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[10] The district court's Senate plan enhances black population concentrations in the black majority Senate districts. Based on comparison with 1980 census data, the proportion of blacks as a percentage of total population and as a percentage of voting age population increases under the district court's plan in *each* of the ten "original" black majority TOP districts, and the average TOP and VAP percentages increase from 56.41% to 59.45% TOP, and from 52.39% to 55.35% VAP. App. 68. Based on comparison with 1990 census data, the percentages of black total population increase in six of the ten "original" districts, and the overall average TOP and VAP percentages increase under the interim plan from 57.66% to 59.45% TOP, and from 53.76% to 55.35% VAP. App. 68. The increase in concentration, moreover, is not achieved at the cost of significantly reducing the size of black majorities in other districts. In three of the remaining districts, black TOP and VAP percentages decrease under the interim plan by concededly insignificant amounts (Districts 7, 39 and 40); in one district (District 42), black TOP decreases by 3.68% to 59.60% and black VAP decreases by 2.59% to 54.43%. App. 68. However, in each of these districts except District 40, the incumbent is black. App. 27 n.34.

A reapportionment plan that increases black voting strength as compared to an approved and lawful prior plan, particularly in light of declining proportions of total black population and voting age population within the state, cannot dilute or abridge the right to vote. As the Court observed in *Beer*, 425 U.S. at 141, "reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning" of Section 5. *See also City of Lockhart*, 460 U.S. at 135-36. The appellants' claims that the district court may have utilized standards or procedures that in certain subtle and technical ways allegedly are incorrect, therefore, essentially is academic. Such claims do not present a case deserving of plenary review.

Shorn of their spurious references to Voting Rights Act issues that may be presented in other cases but are not presented here (*see* pp. 22-23, *infra*), the essence of the appellants' complaint is that the district court should have adopted "better" plans, that is, plans that advanced one or another of the particular policies favored by the appellants, whose redistricting plans were not adopted by the court. This complaint is misdirected. As noted above, *see* p. 14, *supra*, redistricting is first and foremost a legislative task, which the courts should "make every effort not to pre-empt." *Wise*, 437 U.S. at 539. The court may not make decisions concerning "basic political policy," as these are the responsibility of the state legislature. *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985). The court below properly refused to be drawn into the role of a three-member super legislature.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT APPLIED WELL-ESTABLISHED LEGAL CRITERIA AND DID NOT ABUSE ITS DISCRETION IN FORMULATING INTERIM REDISTRICTING PLANS

When a state legislature fails to establish a constitutional redistricting plan, a district court may, within

broad constitutional limits, formulate its own interim plan, as the court below did. *See Wise*, 437 U.S. at 540; *Connor*, 431 U.S. at 415; *White v. Weiser*, 412 U.S. at 794-95; *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971). In reviewing such a plan, "[t]he essential question . . . is whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Connor*, 431 U.S. at 414. The exercise of that discretion is reversible only if it is abused. *See, e.g., East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944). Far from abusing its discretion, the court below painstakingly laid out the governing principles and carefully and thoughtfully applied them to the facts before it.

A. The District Court's Interim Redistricting Plans Are Consistent With Well-Established Legal Criteria

As this Court noted 15 years ago, "'[i]t can hardly be said that this Court has given no guidance of general applicability to a court confronted with the need to devise a legislative reapportionment plan when the state legislature has failed.'" *Connor*, 431 U.S. at 414; *see Seamon*, 456 U.S. at 41 (quoting *White v. Weiser*, 412 U.S. at 794-95). These principles are even better delineated today. In exercising its discretion to fashion a court-ordered redistricting plan, the district court should seek to devise a plan that minimizes deviation from the one person, one vote ideal. *Chapman v. Meier*, 420 U.S. at 26-27. The district court also should strive for racial fairness: the court-ordered plan must not be racially discriminatory in purpose or effect, *McDaniel*, 452 U.S. at 148, and it may not be retrogressive or dilutive in its effect on minority voting rights. *City of Lockhart*, 460 U.S. at 134; *Beer* 425 U.S. at 141. Equally important, in light of the federalism concerns inherent in court-ordered redistricting, a court-ordered plan must "follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution" and the Voting

Rights Act. *White v. Weiser*, 412 U.S. at 795; *see Seamon*, 456 U.S. at 41-43; *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1970).

In rejecting the plans proposed by the parties and in fashioning its own interim plans, the district court properly applied these relevant legal principles. The court below declined to adopt party-proposed plans that it found were politically or racially motivated, and instead implemented plans that meet the constitutional objective of population equality, comply with the standards of the Voting Rights Act, and respect the policies of South Carolina to the extent not inconsistent with these other goals.

1. The district court crafted plans that are valid under the Equal Protection Clause since they provide for only *de minimis* population variance between districts. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The appellants do not argue otherwise.[11]

2. The district court's plans also properly assure racial fairness. In formulating a redistricting plan, a district court is required to "follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel*, 452 U.S. at 149 (quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785). The court below did exactly as the law requires.[12]

[11] The district court's plan for the South Carolina Senate results in a total deviation range of 1.95 percent (App. 61); for the House, a range of 1.98 percent (App. 72); and for the Congress, a range of 0.0 percent (App. 81).

[12] In an effort to distract this Court, appellants wrench out of context the district court's references to the action before it as "Section 5 proceedings." SRAC Juris St. at 9; Gov. Juris. St. at 6. *See* App. 38. Appellants protest that this case was not brought under Section 5, and thus argue that the court below misunderstood what it was doing. This argument is a red herring. From the context of the district court's lengthy opinion, it is clear that the court understood and meant simply that it was applying Section 5 *standards*, as the law requires, not that the case was a formal Sec-

The essence of a Section 5 inquiry is a determination whether implementation of voting-procedure changes "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The district court's interim plans do not simply avoid retrogression, but actually improve the opportunity for black citizens to elect representatives of their choice in both houses of the General Assembly. *See* p. 16, *supra*. A plan that enhances minority opportunity with respect to the effective exercise of the electoral franchise, as the district court's plans do, is not retrogressive within the meaning of Section 5. *Beer*, 425 U.S. at 141; *see also City of Lockhart*, 460 U.S. at 134 & n.10.

3. The district court recognized that it was required to follow the "policies and preferences" of the state, as expressed in the South Carolina Constitution and statutes and in the plans proposed by the state legislature, to the extent these were not inconsistent with other federal constitutional and statutory obligations. App. 14; *see Seamon*, 456 U.S. at 43; *White v. Weiser*, 412 U.S. at 795. The court found that South Carolina's strongest electoral policy is that of "maintaining the integrity of county boundaries in the redistricting process." App. 15-16. In addition, the court considered other legitimate state policies, including maintaining other "political subdivision lines, compactness, contiguity, recognition of historical boundaries, and protection of constituent representative relations." App. 62. *See also Connor*, 431 U.S. at 419; *Chapman v. Meier*, 420 U.S. at 22-23; *Karcher v. Daggett*, 462 U.S. at 740; *Swann v. Adams*, 385 U.S. 440, 444 (1967). As our description above of the district court opinion makes clear, the district court took all these factors into account. *See* pp. 7-12, *supra*.

The appellants take issue with the district court for giving too much deference to state policies. As shown

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tion 5 challenge to a plan that has not been pre-cleared. *See* App. 25. As discussed in the text, the court also applied Section 2 standards.

above, however, the court properly applied the principles of the Constitution and Voting Rights Act, including the critical principle that the court-ordered plans *must* adhere as closely as possible to the policies of the state. The court found that, unlike its own plans, the plans proposed by the appellants failed to "strike[] the proper balance between the various interests arising in this type of proceeding, including equality of population in districts, racial fairness, and maintenance of . . . South Carolina's political subdivisions and communities of interest." App. 69-70.

To maintain county boundaries, political subdivisions and geographical compactness and contiguity, the district court's Senate and House plans have far fewer excess county-line and precinct-line cuts than the plans proposed by SRAC, the Governor or the Republican Party. *See* App. 63-64; pp. 10-11, *supra*.[13] The district court found that its Senate plan allowed for more compact and contiguous districts than the appellants' plans, which the court considered overly violative of the state's political boundaries. App. 63. Similarly, the House plans proposed by the appellants "throw[] all consideration of the state policy of recognizing county lines to the wind." App. 73.

[13] The Governor's and Republican Party's Senate plans, for example, made 52 and 56 excess county-line cuts, respectively, while the court's made only 30; the Governor's Senate plan split 122 precinct lines and the Republican Party's split 144, while the court's plan splits only 49. App. 63-64. Similarly, the district court's House plan contains only 20 excess cuts in county lines, whereas the Governor's House plan made 38 and SRAC's House plan made 48 excess cuts in county lines. App. 73-74. Further, under the court's plan, only 29 House districts lie in 2 counties, 7 lie in 3 counties, and 2 lie in 4 counties. App. 73. The Governor's plan had 33 districts lying in 2 counties, 12 lying in 3 counties, 1 lying in 4 counties, and 1 lying in 5 counties. App. 74. Worse yet, SRAC's plan called for 34 districts to lie in 2 counties, 9 to lie in 3 counties, 6 to lie in 4 counties, and 3 to lie in 5 counties. App. 74. Appellants try to minimize before this court the importance of these factors, but one of SRAC's own expert witnesses testified below to the problem of disenfranchisement of voters caused by fragmentation, especially among blacks. Tr. at 30-32 (testimony of Theodore S. Arrington, Feb. 21, 1992).

The court found that the Governor's plan called for "splintering and splicing" of towns and counties, App. 78, and SRAC's plan split communities of interest to draw lines based solely on skin color. App. 78-79. The district court concluded that the appellants' plans fail "to suggest even a casual observance of South Carolina's traditional and legitimate policies." App. 65. Clearly, the district court's plans—which properly recognize that fragmentation of districts undermines the ability of constituencies to organize and increases voter confusion, App. 16 n.29—most adequately respected the policies of the state.[14]

Not surprisingly, there is an explanation for the line-drawing performed by the appellants: politics. The Republican Governor's Senate plan, for example, pitted ten incumbent Democratic senators against one another. App. 65 n.61. Regarding the proposed House plans, the district court observed that "the Republican Party and the Governor appear to seek to eliminate Democrats and the SRAC appears to seek to eliminate incumbents because of their race." App. 74. Promotion of such political or racial agendas are not properly advocated by the courts. Courts fashioning redistricting plans must act " 'circumspectly, and in a manner "free from any taint of arbitrariness or discrimination." ' " App. 14 (quoting *Connor*, 431 U.S. at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964))). The district court was not free to impose its own political agenda, but was required to adhere to the guidelines laid down by this Court, which, as explained above, it carefully and reasonably did.

B. The District Court Properly Applied Section 2 In Fashioning Its Interim Plans

Appellants' principal objection to the district court's plans raises an issue not presented on this record: whether and to what extent a court-ordered interim plan must comply in all respects with Section 2. Appellants assert

[14] Further, the district court found SRAC's Senate plan, with a population deviation of 2.74%, to be "pushing the outer limits of the *de minimis* standard." App. 61 n.58.

that the court below, in fashioning interim plans, was required, but declined, to apply Section 2 as it has been interpreted by this and other courts in challenges to specific, existing election plans and practices. As we show below, even assuming that Section 2 applies to a court-ordered interim plan, the district court properly analyzed its plans under Section 2. It is thus not necessary to reach the question posed by appellants.

1. According to SRAC, the district court "did not undertake a meaningful analysis of minority vote dilution under Section 2 and *Thornburg v. Gingles*, . . . [but] [i]nstead, it applied the Section 5 retrogression standard of *Beer v. United States*." SRAC Juris. St. at 18. Similarly, the Governor complains that "the court below applied a 'retrogression' standard which purported to satisfy Section 2 of the Voting Rights Act." Gov. Juris. St. at 5. These assertions are simply wrong.

The district court's Order shows that, when considering the proposed plans and developing its own redistricting plans, the court carefully reviewed and applied Section 2, paying particular attention to this Court's decision in *Gingles*. Starting with the text of Section 2, the court noted that "Congress amended § 2 in 1982 to include a 'results,' or 'effects,' test to determine if racial vote dilution has occurred." App. 33. The district court observed this Court's admonition in *Gingles* that " '[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.' " *Id.* (quoting *Gingles*, 478 U.S. at 47). Following *Gingles*, the district court considered the " 'typical' factors which may be relevant to, and probative of, a § 2 claim," known as the " 'Senate factors,' " App. 34 (quoting *Gingles*, 478 U.S. at 36-37). Having laid out the factors and principles underlying a Section 2 analysis as described in *Gingles*, App. 31-38, the district court then devoted approximately 20 pages to discussing how those factors and principles would be applied to provide

an appropriate remedy in this case, involving as it does single-member districts, App. at 38-57, and then another 27 pages applying those principles, App. 58-85. Unquestionably, the court tested its plans under the requirements of Section 2. *See* pp. 8-9, *supra*.

2. The appellants attempt to make much of the district court's statement that it would not "completely [incorporate] the tests and requirements of § 2" into this case. App. 38. The Governor complains, for example, that

> [t]he court below never articulated which "tests and requirements" it refused to apply. . . . Presumably, the court below was referring to the three-pronged *Gingles* test (a minority group must be sufficiently numerically large and geographically compact to constitute a single member district, be politically cohesive, and be otherwise unable to nominate and elect its preferred candidates due to white racial bloc voting) and the seven ["Senate factors"].

Gov. Juris. St. at 12 n.9. But the district court explicitly stated that it considered, *inter alia*:

> . . . 2) the extent to which reasonable [sic] compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist . . . [and to the extent relevant the seven] Senate factors.

App. 46. Indeed, in his statement, the Governor appears to concede that the district court analyzed these factors. Gov. Juris. St. at 6. Thus, the district court did precisely what the Governor, in claiming that a proper Section 2 analysis had not been conducted, presumed the district court had not done.[15]

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[15] Appellants claim that the incorporation into Section 5 of Section 2, including all its procedural and evidentiary requirements, was effected by footnote 31 to the Senate Report, which states that "[i]n light of the amendments to § 2, it is intended that a § 5 objection follow if a new voting procedure itself so discriminates as to violate section 2." If anything, the footnote merely states that a violation of Section 2 establishes a violation of Section 5. Further, as the district court held, App. 45, it is highly doubtful

Furthermore, a reading of the district court's Order makes clear that the Section 2 "tests and requirements" the court declined to adopt were not the *substantive* standards of the statute, but rather all the procedural and evidentiary requirements set forth in *Gingles*, which was a challenge to an *existing* multi-member plan. The court below simply recognized that not all of those requirements could be applied wholesale to single member districts or to a case where the court was being asked to apply Section 2 in fashioning its own interim plans within a limited time prior to election.

The district court recognized, for example, that rules developed in challenges to specific, implemented plans may not work where the court is fashioning a new plan. The court noted that "in the context of this case, in which no less than five plans have been submitted for each political body, the burden of proof becomes more complex, especially if the whole of the results test is injected into the proceeding." App. 41. It can hardly have been an abuse of discretion, therefore, for the district court not to have adopted the precise rules governing burden of proof set out in *Gingles*.[16]

Similarly, no abuse of discretion is evident in the district court's judgment that time did not permit as "searching" a factual analysis as some courts engage in when addressing a Section 2 challenge to an existing plan or election practice.[17] The district court explained that the

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that Congress intended to amend Section 5 through a footnote to a report on Section 2. Similarly, the Justice Department regulation on which appellants rely—28 C.F.R. § 51.55(b)(2) (1991)—simply calls for Section 5 analyses of plans to consider the substantive standards of Section 2, as the court below did.

[16] As the legislative history of the 1982 amendment makes clear, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. No. 97-417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 207.

[17] The district court also expressed concern about making a "blanket rule" that in cases of this type all the requirements of a

"filing dates and primaries ha[d] already been postponed once," and that imposing a full Section 2 evidentiary burden as to "each proposed plan in this case would have been staggering and would likely still be ongoing." App. 44. If courts faced with the exigent circumstances of impending elections were required to engage in protracted proceedings and make lengthy factual findings, their ability to rule expeditiously would be undermined. The appellants' rigid view of Section 2 evidentiary requirements is not consistent with the flexibility normally accorded a court when fashioning equitable relief in exigent circumstances. *See, e.g., Seamon*, 456 U.S. at 44.

Appellants were not prejudiced by the procedure they now attack. During the three-week trial, the district court allowed ample opportunity for submission of evidence that might assist in its Section 2 analysis. The district court admitted *all* the documentary evidence submitted by the parties, and permitted SRAC's and the Governor's witnesses to testify regarding the history of discrimination in South Carolina and any other Section 2 factor they wished to address. Indeed, in its jurisdictional statement, SRAC notes that the "SRAC and *Burton* plaintiffs submitted substantial evidence of the factors deemed probative of minority vote dilution identified in *Thornburg v. Gingles* . . . and the ['Senate factors']." SRAC Juris. St. at 5. SRAC goes on to discuss the evidence submitted relevant to the "Senate factors," including expert witness testimony, statistical analyses, and other documentary evidence. *Id.* at 5-8. It is hard to imagine, and the appellants fail to make clear, what the district court could have done to make its analysis more "meaningful." [18]

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formal Section 2 inquiry apply, for fear that after its implementation, the plan would then be protected from a subsequent Section 2 challenge by the principles of *res judicata*. App. 42.

[18] Indeed, in a recently filed petition for a writ of certiorari seeking review of a court-ordered plan, the petitioners cited the South Carolina district court's handling of this issue as exemplary. *See* Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, at 12-13, *Loeper v. Mitchell*, No. 91-2015 (filed June 8, 1992).

3. Stripped of its rhetorical baggage, the essence of appellants' claim is that Section 2 required the district court to create a greater number of black majority districts and to gerrymander those districts such that they contain black super majorities of at least 57% TOP. SRAC Juris. St. at 20, 25-26; Gov. Juris. St. at 19-20. No constitutional or statutory basis exists for either contention, as the district court correctly held. In exercising its discretion, the court was not bound by rigid requirements regarding numbers and percentages. It was, rather, required to act reasonably to formulate districts that were non-discriminatory, non-retrogressive and non-dilutive, and that honored state policies.

There is no constitutional or statutory requirement to maximize the number of majority-black districts. Certainly Section 5 imposes no such requirement.[19] Neither does Section 2. In enacting the 1982 amendment to the Voting Rights Act, Congress sought to change the result of this Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 required a showing of discriminatory intent. The 1982 amendments were intended simply to "'restore the pre-*Mobile* [*v. Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote,'" principally the standards set forth in *White v. Regester*, 412 U.S. 755 (1973), and its progeny. *Chisom v. Roemer*, 111 S. Ct. 2354, 2363 n.21 (1991) (quoting S. Rep. No. 97-

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[19] *See City of Lockhart*, 460 U.S. at 134; *Beer*, 425 U.S. at 140-41; *Perkins*, 400 U.S. 379; *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd mem. sub nom., Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Turner v. Arkansas*, 784 F. Supp. 553, 573 (E.D. Ark. 1991) (the Voting Rights Act "is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence"), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Watkins v. Mabus*, 771 F. Supp. at 805; *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979) ("No state or political subdivision is required to search for ways to maximize the number of black voting age population districts."), *aff'd mem.*, 444 U.S. 1050 (1980).

417 at 27). "Cases decided prior to the 1982 amendment to the Voting Rights Act uniformly hold that states are not required to seek out ways to maximize the number of black majority districts." *Watkins v. Mabus*, 771 F. Supp. at 806; *see Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.), *aff'd mem. sub nom., Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). As the court below explained, appellants' approach serves as a

> "racial ratchet," which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of all other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute.

App. 30-31.

This is not to say that redistricting plans that have as a goal the maximization of black-majority districts cannot be implemented. In this case, the legislature remains free to enact a plan that, consistent with legal requirements, advances any legitimate political policy, including, perhaps, the creation of a greater number of "safe" minority districts. The district court, however, was not required—or even permitted—to make such a policy choice.

Appellants also are wrong in contending that the district court's plans are invalid because all black majority districts do not contain at least 57% black TOP. This Court's decisions do not require the creation of super-majority districts. In fact, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 162 (1977), a plurality of this Court specifically declined to set such an arbitrary number against which to test a plan's validity. The decision below is fully consistent with the cases decided pre-*Bolden*.[20]

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[20] Both federal and state courts have approved plans characterizing as minority-opportunity districts those districts containing black majorities of slightly over 50%. In *Jordan v. Winter*, for example, this Court affirmed a district court judgment devising an interim

Appellants lose sight of the fact that under the district court's plans, blacks in most black majority districts have significantly more than a "bare" majority. In the Senate plan, for example, seven of the eleven black majority TOP districts have black majorities ranging from 58.91% to 68.51%, and all but one district have majorities of over 54%. App. 68. The remaining district, which also had a black majority of less than 54% under the 1984 plan, has a black incumbent Senator who has been re-elected. The district court's finding that these percentages will provide effective representation given the facts of this case is not clearly erroneous or an abuse of discretion. If the 1992 elections reveal that in certain districts blacks are unable effectively to participate in the electoral process and elect

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plan that created a Congressional district with a 52.83% black VAP and rejected an alternative plan containing a 60% majority. The district court concluded that "52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting" and would "afford black citizens an equal opportunity to participate in the political process." 604 F. Supp. at 814. As Justice Stevens noted in his concurrence to the summary affirmance, the 52.83% district provided a "remedy that established at least one district in which black persons represented an *effective majority* of the eligible voters." 469 U.S. at 1005, n.4 (emphasis added). *See also Ewing v. Monroe County*, 740 F. Supp. 417, 426 (N.D. Miss. 1990) ("a range of 51-55% black voting age population is sufficient to enable blacks to elect candidates of their choice"); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985) (plurality black VAP sufficient under Section 2); *Mellow v. Mitchell*, No. J-57-1992, at 9, 11 (Pa. Mar. 26, 1992) ("no legal requirement . . . that a district have a 65% African-American total population to satisfy Section 2"; finding that 52.4% black TOP "would henceforth give African-Americans the opportunity to elect candidates of their choice"), *petition for cert. filed*, 60 U.S.L.W. 3881 (June 8, 1992) (No. 91-2015). To be sure, certain district courts have found that the facts before them called for the creation of super-majority districts. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-15 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Emison v. Growe*, 782 F. Supp. 427, 440-41 (D. Minn.), *prob. juris. noted*, 112 S. Ct. 1557 (1992); *Neal v. Coleburn*, 689 F. Supp. 1426, 1437-38 (E.D. Va. 1988). These cases, however, simply used super-majority percentages as "flexible and practical guidelines," *Neal*, 689 F. Supp. at 1438, to be considered in the "particular circumstances" of the facts of the cases. *Ketchum*, 740 F.2d at 1413.

representatives of their choice, and a Section 2 challenge is made, the court then can consider whether in particular districts and under a particular set of facts a supermajority is the required remedy.

CONCLUSION

This Court should dismiss the appeals as moot or summarily affirm the judgment below.

Respectfully submitted,

JOHN C. MOYLAN, III
(Counsel of Record)
OFFICE OF THE LIEUTENANT GOVERNOR
P.O. Box 142
Columbia, SC 29202
(803) 734-2080

TERRELL L. GLENN
BLANEY A. COSKREY, III
GLENN, IRVIN, MURPHY GRAY & STEPP
1510 Calhoun Street
P.O. Box 1550
Columbia, SC 29202
(803) 765-1100

WILLIAM R. STEIN
MARK H. DUESENBERG
HUGHES HUBBARD & REED
1300 I Street, N.W.
Suite 900 West
Washington, D.C. 20005
(202) 408-3600
Attorneys for Lieutenant Governor Nick Theodore

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

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NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

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MOTION TO DISMISS OR AFFIRM

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee South Carolina Senate

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

(1) Did the court below properly determine that the plan it drew for the South Carolina Senate did not have a discriminatory effect under Section 5 of the Voting Rights Act by applying the retrogression test announced by this Court in *Beer* v. *United States*, 425 U.S. 130 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983)?

(2) Did the court below, in fashioning its redistricting plan for the South Carolina Senate, give adequate consideration to Section 2 of the Voting Rights Act when it designed a plan so as not to violate the threshold requirements for liability under Section 2 established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986)?

(3) Did the court below properly determine that, in fashioning its plan for the South Carolina Senate, it was not required to maximize minority voting strength?

(3) Assuming *arguendo* that maximization is required, did the court below, in fashioning its plan for the South Carolina Senate, create the maximum number of districts in which black voters have the potential to elect a candidate of their choice, as defined by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and other cases interpreting Section 2 of the Voting Rights Act?

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IN THE

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OCTOBER TERM, 1992

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NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

MOTION TO DISMISS OR AFFIRM

INTRODUCTION

In this case Plaintiffs-Appellants Statewide Reapportionment Advisory Committee, *et al.* ("SRAC") and Defendant-Cross-Appellant Carroll A. Campbell, Jr., the Governor of South Carolina (collectively, "Appellants"), appeal the order of a three-judge court which issued an injunction redistricting the South Carolina Senate and House of Representatives and the State's six Congressional districts.[1] Appellants argue that the three-

[1] Because the Governor was named as a defendant below, he is a cross-appellant in this Court; however, he seeks much the same

judge court failed to give adequate consideration to the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, which prohibits voting laws that result in discrimination against blacks and other protected minority groups by denying them an equal opportunity "to participate in the political process and to elect representatives of their choice." Appellant SRAC claims further that the court consequently failed to maximize the number of black majority districts, as supposedly mandated by Section 2. Because Appellants' arguments are without merit, Appellee South Carolina Senate ("the Senate") moves that the appeal be dismissed or, in the alternative, that the judgment of the three-judge court be affirmed.

STATEMENT OF THE CASE

I. BACKGROUND AND PROCEDURAL HISTORY

South Carolina's General Assembly is composed of a House and a Senate. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. May 1, 1992) (to be reported at 793 F. Supp. 1329) (three-judge court), reproduced in Appendix to SRAC Jurisdictional Statement ("SRAC App.") 4. The Senate has 46 members, who are elected from single-member districts. SRAC Jurisdictional Statement ("SRAC J.S.") 12.

The Senate was last reapportioned in 1984. After a three-judge court adopted an interim redistricting plan with nine black majority districts and held that this plan satisfied Section 2, *Graham v. South Carolina*, No. 3:84-1430-15 (D.S.C. July 31, 1984) (copy lodged with this Court), the General Assembly passed a plan that created ten black majority districts. SRAC App. 5, 27 n.34. Of these ten districts, seven had a black majority voting age population ("VAP"). SRAC App. 27 n.34. The Gov-

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relief as the SRAC. Appellants do not challenge the three-judge court's proposed Congressional districts, but rather only the plans for the Senate and House. The Senate will address only those arguments relating to the three-judge court's plan for the Senate.

ernor signed the plan into law, and the United States Attorney General "precleared" it pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[2]

Following the 1990 census, which revealed that the districts drawn in 1984 had become substantially unequal in population, the Senate set about the task of redistricting. The Senate Judiciary Committee's seven-member Subcommittee on Redistricting and Reapportionment (which included one black member and two Republicans) held extensive public hearings, in order to obtain the views of citizens and interested groups regarding redistricting. The Subcommittee also adopted a set of neutral criteria to guide it in formulating redistricting plans. These criteria included drawing districts of equal population (the "one person, one vote" rule) and complying with the Voting Rights Act. Following the hearings, the Senate passed a redistricting plan for itself and a Congressional redistricting plan. The plans were introduced in the House, but the House was unable to act on them before the General Assembly's statutorily mandated *sine die* adjournment date of June 6, 1991. S.C. Code Ann. § 2-1-180 (Law. Co-op. 1986).

On October 4, 1991, Michael Burton, the Executive Director of the South Carolina Republican Party, brought an action challenging the continued use of the 1984 Senate districts, as well as the Congressional and House districts drawn after the 1980 census. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. filed Oct. 4, 1991). The complaint alleged that these districts violated the one person, one vote rule and Section 2. The complaint further

[2] Section 5 requires certain jurisdictions, including South Carolina, to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526 (1973) (holding that Section 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

alleged that the General Assembly was deadlocked on the issue of redistricting and that judicial action to implement redistricting plans was therefore necessary. The complaint sought declaratory relief, an injunction against the further use of these districts, and an order implementing Congressional and State legislative redistricting plans to be offered by plaintiffs. The Senate moved to intervene pursuant to Fed. R. Civ. P. 24, and the motion was granted on November 13, 1991.

On October 31, 1991, the SRAC brought its own redistricting suit, *Statewide Reapportionment Advisory Committee v. Campbell*, No. 3:91-3310-1 (D.S.C. filed Oct. 31, 1991), making substantially the same allegations as the *Burton* plaintiffs.[3] The two suits were consolidated for trial before a three-judge panel, consisting of Circuit Judge Clyde Hamilton, Chief District Judge Falcon Hawkins, and District Judge G. Ross Anderson, Jr., that had been appointed pursuant to 28 U.S.C. § 2284.

After the General Assembly reconvened on January 14, 1992, it moved quickly on reapportionment and passed a plan for the Senate on January 29, 1992. The Governor vetoed the plan and the veto was sustained. With respect to Congressional redistricting, the House and Senate passed separate plans. A conference committee was appointed, but was unable to reach agreement. As a consequence of the apparent impasse, the three-judge court undertook to devise its own Congressional and State legislative redistricting plans.

II. THE TRIAL

The trial commenced on February 19, 1992, and continued through March 6. At the outset, all parties stipulated that the existing Congressional and State legislative districts (*i.e.*, those adopted following the 1980

[3] While neither complaint asserted Section 5 of the Voting Rights Act as a basis for jurisdiction, the SRAC concedes that it contended below that "any plan adopted by the court must comply with Sections 2 and 5 of the Voting Rights Act." SRAC J.S. 5.

census) were malapportioned and could no longer be used. SRAC App. 3 n.2. The stipulation obviated the need for the court to reach the claim that these districts also violated Section 2 of the Voting Rights Act. SRAC App. 3 n.2. Rather, given this threshold stipulation, the court's task was to implement a plan that remedied the one person, one vote violation while complying with all other legal requirements, including the Voting Rights Act.

The court's task was a massive one, which had to be undertaken in the face of tight time constraints. Primary elections were scheduled for June 9, 1992, as required by S.C. Code Ann. § 7-13-40 (Law. Co-op. Supp. 1991), and State legislative and Congressional candidates were required by law to file notices of candidacy by March 30 and April 30, 1992, respectively, S.C. Code Ann. § 7-11-210 (Law. Co-op. Supp. 1991). To alleviate some of the time pressure, the court postponed the primary until August 25 and the filing deadlines until June 25. SRAC App. 86 n.79. Even with this delay, the court still faced a substantial task, which was made even more difficult by the fact that the parties offered nine proposed plans for Congress, five for the House, and five for the Senate.[4] During the three weeks of hearings, the court heard lay and expert testimony from numerous witnesses and received hundreds of exhibits totalling in the thousands of pages.

The SRAC advocated a plan for the Senate that its drafter freely admitted was designed to maximize numerically black representation. Senate Appendix ("Sen. App.") (attached hereto) 16a, 17a-18a, 22a. Contending that a district generally had to be 58% black in total population in order to give blacks an equal opportunity to elect candidates of their choice, Sen. App. 17a,

[4] Senate plans were offered by the SRAC, the Governor, the Senate, the Lieutenant Governor, and the *Burton* plaintiffs (on behalf of the Republican Party). SRAC J.S. 12. Because only the SRAC and the Governor have appealed, only their plans will be addressed in this brief.

the SRAC drew as many districts as possible that exceeded this percentage. The SRAC plan for the Senate contained a total of 14 black majority districts, of which 12 had a black VAP majority. *See* SRAC J.S. 12 (chart comparing the various plans for the Senate).

Like the plan ultimately drawn by the three-judge court (which is depicted at Sen. App. 41a), the SRAC plan (which is depicted at Sen. App. 42a) placed eleven black majority districts in areas with naturally occurring, compact, and contiguous black population concentrations. Unlike the court's plan, however, the SRAC plan drew three additional black majority districts by stringing together scattered pockets of minority population with no community of interest. The SRAC plan included a district in the Savannah Valley (SRAC District 10) which stretched for almost 100 miles beginning in Anderson County[5] and extending through six other counties along the Georgia border; a district winding northward from the suburbs of Columbia in the central part of the State all the way to Spartanburg County near the North Carolina border (SRAC District 15); and a district created by roping minority concentrations from Georgetown, Horry, Marion, and Williamsburg Counties in the eastern part of the State (SRAC District 34).[6]

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[5] A county map of South Carolina is included in the Appendix to the Governor's Jurisdictional Statement 43.

[6] In order to make this district an "open" one (*i.e.*, without an incumbent), the SRAC plan put two white incumbents together in an adjacent district. The drafter of the SRAC plan, Dr. John Ruoff, admitted that he would not have paired these two incumbents if they had been black. Sen. App. 39a. While conceding that whites could represent blacks and that both these incumbents represented districts with "pretty solid" black majorities, Dr. Ruoff explained that he was not seeking to protect existing black majority districts but rather to protect existing black majority districts that were electing blacks. Sen. App. 24a-25a.

The Governor advocated a plan (which is depicted at Sen. App. 43a) that contained two more black majority districts than in the three-judge court's plan (Governor's Districts 10 and 34) in roughly the same areas as SRAC Districts 10 and 34. The Governor's plan pitted ten Democratic Senators against each other. SRAC App. 65 n.61.

Appellants argued that the creation of the additional black majority districts was justified (and, in fact, required) because of allegedly extensive racial bloc voting in South Carolina.[7] At the urging of the court, the parties stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The SRAC and the *Burton* plaintiffs also offered expert testimony that voting in South Carolina is highly polarized along racial lines. The SRAC is wrong, however, to characterize this evidence as "unrebutted." SRAC J.S. 6. Counsel for the Senate, the Lieutenant Governor, and the South Carolina Democratic Party demonstrated through cross-examination that the evidence of racial bloc voting in the three additional districts that the SRAC and/or the Governor sought to create was simply inadequate.[8]

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[7] In *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986), this Court defined racial bloc voting as a consistent relationship between the race of the voter and the way he or she votes.

[8] With respect to those districts, the *Burton* plaintiffs' expert Dr. Theodore Arrington admitted that he had analyzed only one election, the 1990 general election for Governor, in which State Senator Theo Mitchell, who is black, lost to Carroll Campbell, a highly popular white incumbent. Sen. App. 1a. As the court properly found, "the testimony regarding the strength of polarization exhibited in some races, such as the 1990 governor's race, was minimized by factors such as incumbency." SRAC App. 56. Moreover, for some reason, Dr. Arrington did not analyze the 1990 Democratic primary for Governor, in which Senator Mitchell beat a white opponent. Sen. App. 5a.

Dr. James Loewen, who testified as an expert for the SRAC, analyzed no elections after 1984. SRAC J.S. 6-7. He made no study

Even assuming that the plaintiffs had offered credible evidence of racial bloc voting (or, alternatively, that the parties' general stipulation sufficed to prove the existence of bloc voting in the particular areas under dispute), there was still substantial evidence that the additional black majority districts proposed by the SRAC and by the Governor were "illusory," in that they would not have resulted in the election of additional black Senators. Both plans sought to draw the additional districts by ignoring county lines, traditional communities of interest and naturally occurring compact areas of minority strength. Instead, they roped together diverse areas of minority population without regard to any other factor.

For example, the three-judge court found that the *Burton* plaintiffs' proposed District 10, which is highly similar to District 10 in both the SRAC and the Governor's proposed plans, "cuts into seven counties to garner black voters, and consolidates three insular and historical communities of interest." SRAC App. 63-64. The court described this district as "a particularly egregious example of the Governor's and the Republican Party's disregard for county lines and communities of interest . . . [because] the urbanites of Anderson County would be grouped with the rural communities of Abbeville County [and] the pulpwood farmers of McCormick County would

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of blacks who have been successful in winning election to the General Assembly, was unaware that certain of the districts he did analyze were now represented by blacks, and performed no analysis of any of the plans that were offered to the three-judge court. Sen. App. 13a-15a.

Dr. John Ruoff, another one of the SRAC's experts, agreed with Drs. Arrington and Loewen that racial polarization existed. Yet he performed no analysis of whether voting was polarized in the proposed Savannah Valley district. Sen. App. 35a. With regard to the proposed District 34, he did no analysis of elections in Georgetown County and further admitted that the black community in Williamsburg County was able to elect candidates of its choice despite polarized voting. Sen. App. 33a-35a, 36a. He also admitted to numerous examples of successful black candidacies in cities within the proposed district north of Columbia. Sen. App. 28a-33a.

share representation with the industrial workers of Aiken County." SRAC App. 63-64; *see also* Sen. App. 6a-7a (Testimony of Michael Couick, Director of Research and Attorney for the Senate Judiciary Committee) (District 10, as drawn by the SRAC, the Governor, and the *Burton* plaintiffs, was not an electable minority district due to a combination of factors, including a high number of split precincts, an unacceptable geographic stretch, a lack of unified communities of interest, and the lack of a core existing district).

Similarly, the district proposed by the SRAC north of Columbia (District 15) lacked a community of interest. This proposed district was created by fracturing a compact, cohesive, predominantly black area into two districts (Districts 15 and 17) and splitting precincts and adding disparate groups of black voters with no community of interest to increase the black percentage of the population. *See* Sen. App. 11a-12a.[9]

The majority black districts proposed by the SRAC and the Governor in the eastern part of the State likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. SRAC District 34 fractured Williamsburg County, a black majority county, into four separate districts, and neighboring Georgetown County, which also has significant black population, into three districts. In so doing, the SRAC split Williamsburg County's cohesive black majority, which has successfully elected numerous black officials. These significant changes to existing political boundaries in order to create an additional majority black district in District 34 also had the effect of fracturing the black population in two adjacent effective black majority districts, raising considerable doubt as to whether any of the three resulting districts would provide sufficient electoral opportunities to black voters. *See* Sen. App. 9a-11a.

[9] The Governor did not even include this district in his proposed plan.

District 34 in the Governor's plan created a black majority by borrowing black population from neighboring District 30, another black majority district. To make up for the lost population, District 30 had to pick up black voters from Dillon County. Because these voters have a low turnout, however, the Senate, with the support of the black incumbent in District 30, opposed putting them in the district, fearing that they would impair its electability. Sen. App. 10a.

In addition, the additional black majority districts in the SRAC plan and the Governor's plan contained numerous split precincts, which further impaired minority electability in these districts. Though Appellants claimed that splitting precincts was necessary to create the additional black majority districts, the three-judge court heard extensive testimony that split precincts cause enormous confusion among voters, who frequently do not know the district in which they are supposed to be voting. *E.g.*, Sen. App. 6a-7a, 23a. This confusion decreases turnout, which impacts disproportionately on minority voting strength. Sen. App. 2a-5a.

In sum, the evidence showed that, because the additional black majority districts cut through counties and other communities of interest, joined disparate areas without common geographic or social ties, and split precincts, these districts were not effective, electable black majority districts.

ARGUMENT

I. THE THREE-JUDGE COURT PROPERLY HELD THAT ITS PLANS DID NOT HAVE A DISCRIMINATORY EFFECT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The court below rejected each of the plans proffered by the parties and drew its own plans instead.[10] The three-judge court's plan for the Senate contains eleven districts with black population majorities, an increase of one over the plan passed by the General Assembly and precleared by the Department of Justice in 1984. SRAC App. 68. Ten of these districts have black VAP majorities. SRAC App. 68.

In reaching this result, the court recognized that its remedial plan must be racially fair. The court observed that, under *McDaniel v. Sanchez*, 452 U.S. 130 (1981), it was not required to obtain Section 5 preclearance for its plan. SRAC App. 25. The court also recognized, however, that, in fashioning relief, it "must be cognizant of § 5 concerns that voting changes have neither the 'purpose . . . [nor] the effect of denying or abridging the right to vote' on the basis of race." SRAC App. 25.[11]

[10] The three-judge court's plan for the Senate had a deviation of only 1.95% between the population of the largest and smallest districts. SRAC App. 61. The court rejected plans offered by the Senate and Lieutenant Governor for having too high a deviation. SRAC App. 61-62 n.58. Relying on the State's policy of preserving county boundaries in redistricting, the court rejected plans offered by the SRAC, the Governor, and the *Burton* plaintiffs for splitting more counties than necessary to comply with the one person, one vote rule. SRAC App. 61-63 & n.58. The court's rulings on the one person, one vote issues are not challenged here.

[11] Appellants contend that the court erred in stating that this case arose under Section 5. SRAC J.S. 22; Governor's Jurisdictional Statement ("Gov. J.S.") 3. As the SRAC admits, however, its position below was that "any plan adopted by the court must comply with" Section 5 (as well as Section 2). SRAC J.S. 5. More important, the issue here is not whether this case arose under Section 5 as opposed to Section 2 but rather whether the court gave suffi-

With respect to purpose, the court stated: "We take it as a given that this court, in fashioning its remedy, is not acting with a racially discriminatory purpose." SRAC App. 25. As for discriminatory effect, the court below employed the "retrogression" test of *Beer v. United States*, 425 U.S. 130 (1976), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), and held that its plans did not have a discriminatory effect under Section 5 because they increased minority voting strength from what it had been under the previous redistricting plans. SRAC App. 25-31, 65-67.

Citing *Wilkes County, Ga. v. United States*, 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978), the SRAC argues that, in deciding the retrogression issue, the three-judge court should have compared its plans to those proffered by the parties rather than to the pre-existing plans. SRAC J.S. 18 n.23. As the court observed, however, this approach conflicts with this Court's decisions in *Beer* and *City of Lockhart*. SRAC App. 30 & n.35.

In *Beer*, this Court held that the 1970 redistricting plan for the New Orleans City Council did not have a discriminatory effect under Section 5 because the plan did not diminish black voting strength. 425 U.S. at 141-42. In reaching this conclusion, the Court engaged in a simple comparison of the 1970 plan and its predecessor:

> Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro majority of registered voters . . . . Under [the 1970 plan], by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. . . . It was therefore error for the District Court to conclude that [the 1970 plan] "will . . .

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cient consideration to the requirements of *both* sections in fashioning its plans. As we demonstrate, a fair reading of the court's opinion shows that it did.

> have the effect of denying or abridging the right to vote on account of race or color" within the meaning of § 5 of the Voting Rights Act.

Id. Similarly, in *City of Lockhart*, in determining whether changes to the city's charter were retrogressive, the Court compared the new system to "the practices in use in Lockhart prior to the new charter." 460 U.S. at 133. In light of these cases, the three-judge court here was clearly correct in rejecting the SRAC's claim that the appropriate comparison is between the court's redistricting plans and those proposed by the parties.[12]

II. THE THREE-JUDGE COURT GAVE MORE THAN ADEQUATE CONSIDERATION TO THE REQUIREMENTS OF SECTION 2

Both the SRAC and the Governor contend that, in drawing redistricting plans, the three-judge court failed to give adequate consideration to the requirements of Section 2 and that the decision below conflicts with the opinions of

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[12] The court below also was correct in holding that *Wilkes County* does not control the present case. In *Wilkes County*, the county sought preclearance for a change from unequally populated single-member districts to at-large elections. Though the county claimed that the change was necessary to cure the malapportionment, the court found that the county had acted with a discriminatory purpose in making the change shortly after blacks began registering to vote in substantial numbers. 450 F. Supp. at 1175-76. Applying *Beer*, the court also found that, when "compared to the use of the existing election districts," the use of at-large elections also produced a discriminatory effect under Section 5 by "reducing the influence of blacks in elections." *Id.* at 1178. Either of these findings was sufficient to deny preclearance, because Section 5 requires the absence of both discriminatory purpose and discriminatory effect. 42 U.S.C. § 1973c. Consequently, the court's additional finding that at-large elections had a discriminatory effect as compared to "options for properly apportioned single-member district plans," 450 F. Supp. at 1178, is *dicta*; and whatever its applicability may be to cases involving changes from single-member districts to at-large elections, it is not controlling in the present case, which does not involve such a change.

this Court and others. SRAC J.S. 18, 22-25; Gov. J.S. 8-13. Neither contention is correct.

The court recognized that "[i]t would be incongruous . . . to adopt a plan which did not comport with the standards and guidelines of § 2." SRAC App. 38. Consequently, the court stated that it would be "guided by the admonition in [*Thornburg v.*] *Gingles* [,478 U.S. 30 (1986),] that a determination [under Section 2] of 'whether the political processes are "equally open" depends on a searching practical evaluation of the "past and present reality."'" SRAC App. 45 (citations omitted). The court went on to state that "since it would be anomalous for this court to adopt a plan which immediately lends itself to an attack under § 2, our analysis should ensure that the threshold requirements of a § 2 action cannot be established under the adopted plan." SRAC App. 45. Accordingly, in conducting its analysis, the court considered, *inter alia*, (1) "the extent to which reasonable compact and contiguous majority black districts were and could be drawn"; (2) "the extent to which the minority group is politically cohesive"; and (3) "the extent to which racially polarized voting patterns exist." SRAC App. 46.

These three factors are taken almost verbatim from the leading Section 2 case, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), in which this Court held that they were "necessary preconditions" for any challenge to multimember districts. *Id.* at 50; SRAC App. 36 n.37.[13] Although *Gingles* left open the question of whether these preconditions are applicable outside the context of multimember districts, 478 U.S. at 47 n.12, the court below, in accordance with other decisions on this issue, applied them to the single-member districts at issue here.[14] Thus, draw-

[13] The Governor is thus wrong to imply (Gov. J.S. 12 n.9) that the court below disregarded *Gingles*.

[14] SRAC App. 46; *see, e.g., Nash v. Blunt*, No. 91-0840-CV-W-2, 1992 WL 165162, at *5, *12 (W.D. Mo. July 15, 1992); *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989), *aff'd mem.*, 111

ing single-member districts with these preconditions in mind "insure[d] that the court's plan will not violate the threshold requirements for liability under § 2," SRAC App. 47, and (contrary to the Governor's suggestion, Gov. J.S. 12 n.9) made it unnecessary for the court to consider the other evidentiary factors identified in the legislative history of Section 2 (such as a history of racial discrimination, socio-economic disparities between blacks and whites, and success of minority candidates). *See Brewer v. Ham*, 876 F.2d 448, 451, 453 (5th Cir. 1989) (Section 2 challenge fails because plaintiffs failed to prove first *Gingles* precondition); *McNeil v. Springfield Park District*, 851 F.2d 937, 943-44, 947 (7th Cir. 1988) (same), *cert. denied*, 490 U.S. 1031 (1989).[15]

The SRAC argues that the decision of the court below conflicts with other cases holding that court-ordered plans must comply with Section 2. SRAC J.S. 24. By applying the teaching of *Gingles*, however, the three-judge court did address the Section 2 preconditions. Moreover, despite

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S. Ct. 662 (1991); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 589, 592-94 (E.D. Va. 1988); *Wilson v. Eu*, 823 P.2d 545, 565 (Cal. 1992).

[15] Conducting a more detailed Section 2 analysis was not only unnecessary but also impractical in view of the time constraints the court faced. As the court noted, the absence of valid redistricting plans had already necessitated one postponement of the primaries, and the court quite properly felt that it had to implement a plan as soon as possible in order to avoid further delays and allow elections to take place in a timely fashion. SRAC App. 44. Under similar circumstances, the court in *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.) (per curiam), *aff'd in part and vacated in part on other grounds*, 112 S. Ct. 412 (1991), refused altogether to consider the claims of black voters that the interim redistricting plan adopted by the court violated Section 2. *Id.* at 802-05; *see also Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521 (SJ), CV-92-1776(SJ), 1992 WL 174491 (E.D.N.Y. July 10, 1992) (denying motion to enjoin enforcement of redistricting plan alleged to violate Section 2). *See generally Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam).

what the Governor claims, Gov. J.S. 8-13, the analysis used by the court below is consistent with that undertaken by courts in other recent redistricting cases. For example, just as the court here sought to design a plan that "will not violate the threshold requirements for liability under § 2," SRAC App. 47, the court-appointed special masters who drew the plans in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), sought to "avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of the three [*Gingles*] prerequisites." 823 P.2d at 565. And, like the court here, the court in *DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131 (N.D. Fla. May 29, 1992) (to be reported at 794 F. Supp. 1076 (copy lodged with this Court)), recognized its obligation to "consider in crafting the redistricting plan the [S]ection 2 requirement of ensuring that the plan does not dilute the votes of racial or language minorities." *DeGrandy*, slip op. at 7.[16]

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[16] The cases cited by the Governor involving redistricting in Arizona, New York, Texas, and Illinois have likewise relied on the *Gingles* preconditions to guide their choice of redistricting plans. *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 5, 9-11 (D. Ariz. Apr. 30, 1992) (copy lodged with this Court); *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521(SJ), CV-92-1776(SJ), 1992 WL 152982, at *12 (E.D.N.Y. June 26, 1992) (per curiam); *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991), *aff'd mem. sub nom. Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 648-50 (N.D. Ill. 1991) (examining totality of circumstances, but only after determining that plaintiffs had satisfied the three *Gingles* preconditions).

While the court in *Emison v. Growe*, 782 F. Supp. 427, 435-36 (D. Minn. 1992), refused to apply such preconditions, that opinion provoked a strong dissent, and this Court has noted probable jurisdiction. 112 S. Ct. 1557 (1992). Significantly, the Solicitor General has argued that the *Emison* court erred by failing to apply the *Gingles* preconditions. Brief for the United States as Amicus Curiae at 8-16, *Growe v. Emison*, No. 91-1420 (U.S. May 29, 1992). In the remaining cases cited by the Governor, the parties either did not raise Section 2 issues or entered into stipulations that obviated the need to consider Section 2.

In short, though the court concluded that a plenary Section 2 review was unwarranted, SRAC App. 44, the court did not reject the applicability of Section 2. To the contrary, consistent with both *Gingles* and lower court decisions, the court analyzed the plans it drew and those proposed by the parties "with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind." SRAC App. 46. This is exactly what Section 2 requires. 42 U.S.C. § 1973(b) (Section 2 is violated when members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").[17]

III. THE THREE-JUDGE COURT PROPERLY DETERMINED THAT, IN DRAWING REDISTRICTING PLANS, IT WAS NOT REQUIRED TO MAXIMIZE MINORITY VOTING STRENGTH

The SRAC's primary argument is that, as construed in *Gingles*, Section 2 required the three-judge court to maximize black voting strength. In the SRAC's view, *Gingles* holds that Section 2 is violated whenever an alternative plan exists that creates more black majority districts than the plan adopted (or drawn) by the court and there is evidence of legally significant racial bloc voting. SRAC J.S. 20; *see also* Gov. J.S. 18-19. The SRAC thus unabashedly argues that *Gingles* requires drawing the maximum possible number of black majority districts whenever such polarized voting patterns exist.

The problem for the SRAC, of course, is that neither the language of Section 2 nor the holding of *Gingles* requires any such thing. Section 2 itself says nothing that would mandate maximization of minority voting strength. By its terms, the statute guarantees protected minorities

[17] Because the court below did in fact give more than adequate consideration to the requirements of Section 2, this Court need not reach the Governor's argument that the court erred by failing to incorporate Section 2 standards into its Section 5 analysis. Gov. J.S. 14-18.

only an equal "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), not a maximum number of districts with black majorities.[18] Section 2(b)'s express disclaimer of any right to proportional representation (a system designed to maximize the electoral power of minority voters) further undercuts the SRAC's argument. Indeed, had the court below adopted the SRAC plan, it would have run afoul of the disclaimer, because that plan created 13 allegedly "electable" black majority districts out of a total of 46 (28.2%), Sen. App. 40a, in a State that has a black VAP of 26.9%, SRAC J.S. 5.

Similarly, nothing in *Gingles* requires maximization. *Gingles* holds merely that the ability to create compact black majority districts, minority political cohesiveness, and white bloc voting are "necessary preconditions" to a successful Section 2 claim. 478 U.S. at 50-51. The opinion does not, however, hold that these preconditions are themselves sufficient to establish a Section 2 claim.[19] Nor does

[18] The relevant language of Section 2 is taken directly from this Court's decision in *White v. Regester*, 412 U.S. 755, 766 (1973), and the legislative history makes clear that the 1982 amendment to Section 2 "codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and [the] extensive case law which developed around it, into the application of Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 210. Significantly, the cases construing *White* unanimously rejected maximization. *See, e.g., United States v. Board of Supervisors*, 571 F.2d 951, 955 (5th Cir. 1978); *David v. Garrison*, 553 F.2d 923, 927, 930-31 (5th Cir. 1977); *Panior v. Iberville Parish School Bd.*, 536 F.2d 101, 104 (5th Cir. 1976); *Nevett v. Sides*, 533 F.2d 1361, 1365 (5th Cir. 1976), *cert. denied*, 446 U.S. 951 (1980); *see also Voting Rights Act Vol. 1: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. ("Senate Hearings") 1204-09, 1216-26 (1982) (prepared statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights under Law) (discussing the cases cited above and others applying *White*).

[19] These preconditions concern the ability of protected minorities "to elect representatives of their choice." *Gingles*, 478 U.S. at 50. A violation of Section 2, however, requires not only an unequal

Gingles hold that any plan that fails to create the maximum possible number of black majority districts violates Section 2 if racial bloc voting reaches legally significant levels.

No doubt realizing as much, the SRAC relies on Justice O'Connor's opinion concurring in the judgment in *Gingles*. That opinion, however, actually disagreed with the majority's analysis and explicitly stated that the majority "does not acknowledge . . . expressly" that its holding "results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." 478 U.S. at 85 (O'Connor, J., concurring in the judgment). Under these circumstances, Justice O'Connor's opinion can hardly be said to support a right to a plan that maximizes minority voting strength.

The error in the SRAC's position is further demonstrated by the consistent views of lower federal courts that neither Section 2 nor *Gingles* requires the creation of the largest possible number of black majority seats in State or local governing bodies.[20] The Solicitor General has like-

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opportunity to elect such representatives but also an unequal opportunity "to participate in the political process." 42 U.S.C. § 1973(b). *See Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991) (all Section 2 claims must allege "an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice") (emphasis in original). Thus, demonstrating the existence of the preconditions, without more, would not establish a violation of Section 2. The failure to prove the preconditions, however, obviates the need for any further inquiry under the statute. *See* Argument II, *supra*.

[20] *See Nash*, 1992 WL 165162, at *5-*6 ("We reject [the maximization] argument for a variety of reasons, foremost of which is the lack of any language in the Act to support this position"); *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 114718, at *5 (N.D. Ohio Jan. 31, 1992) ("We conclude that nothing in § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour [v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991),] mandates the drawing of majority-minority

wise stated that "[n]othing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts . . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Voinovich v. Quilter*, No. 91-1618 (U.S. filed July 31, 1992). Thus, contrary to the SRAC's claims, the three-judge court's opinion does not contravene the language of Section 2 or this Court's decision in *Gingles*.

Moreover, the three-judge court's opinion is consistent with the legislative history of Section 2. Although the SRAC contends that the legislative history approved the use of black majority districts as a remedy for minority vote dilution, SRAC J.S. 21-22, the issue here is not whether such districts are an appropriate Section 2 remedy. The issue is whether the three-judge court was obliged to draw the maximum possible number of black majority districts. Nothing in the legislative history supports such a requirement. Indeed, when the SRAC's counsel testified before Congress in support of the bill that eventually became Section 2, he expressly stated, in an effort to rebut the claims of opponents of the bill, that it was "erroneous[]" to describe amended Section 2 as involving a "requirement of 'maximization' of minority political strength." Senate Hearings, *supra* note 18, at 386-87 (prepared statement of Laughlin McDonald). In short, the legislative history provides no more support for the SRAC's arguments than the statutory language or the case law.

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districts wherever there is a concentration of Black voters"); *Turner v. Arkansas*, 784 F. Supp. 553, 573 (E.D. Ark. 1991) (Section 2 "is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence"), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Watkins v. Mabus*, 771 F. Supp. at 805-06 (dictum) ("It is doubtful whether *Gingles* held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible.").

IV. ASSUMING *ARGUENDO* THAT MAXIMIZATION IS REQUIRED, THE THREE-JUDGE COURT SHOULD STILL BE AFFIRMED BECAUSE IT CREATED THE MAXIMUM NUMBER OF TRULY ELECTABLE DISTRICTS

Even if Section 2 required drawing the maximum number of majority black districts (which it does not), the three-judge court's decision should still be affirmed because its plan contains the maximum number of districts that meet Section 2's criteria. Under Section 2, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original). Thus, unless Appellants can show that they had the potential to elect candidates of their choice in the additional districts that they contend the court should have drawn, they cannot prevail.

Whether a particular plan provides minority voters the requisite potential to elect their chosen candidates is peculiarly dependent on the facts of each case, and making this determination requires an "intensely local appraisal of the design and impact" of the plan. *White v. Regester*, 412 U.S. 755, 769 (1973); *see Gingles*, 478 U.S. at 79; *Rogers v. Lodge*, 458 U.S. 613, 622 (1982). Appellate courts review the trial court's determinations using a "clearly-erroneous" standard and give deference to the local judges who heard the evidence. *Gingles*, 478 U.S. at 79.[21] The court below did not err when it declined to draw the three additional majority black Senate districts advocated by the SRAC and the two additional majority black Senate districts advocated by the Governor, because the evidence showed that these districts were not truly electable.

Under the *Gingles* preconditions discussed in Argument II, *supra*, to make out a Section 2 claim, minority voters

[21] This standard applies both to findings regarding the *Gingles* preconditions and to the ultimate finding of vote dilution. *Gingles*, 478 U.S. at 79.

must show, *inter alia*, that their group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Otherwise, they cannot prove that the challenged districting plan impairs their ability to elect candidates of their choice. *Id.* Though the SRAC claims that a district must have at least 57% black total population to be electable, SRAC J.S. 8, this approach is inconsistent with the case law, which has recognized that the concentration of black voters required to satisfy Section 2 will vary from district to district depending upon the circumstances.[22] Appellants' approach is also inconsistent with the evidence, which showed that black candidates have been elected in districts that were less than 57% black and white candidates have been elected in districts that exceeded this figure.[23] In short, whether a district can elect a black candidate depends not just on percentages but also on the presence of an incumbent in the district, the district's compactness, and other factors.

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[22] *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 1992 WL 152982, at *7 ("the Supreme Court has declined to adopt bright-line formulae for determining whether the VAP percentage of a minority group in a district is so low that a court should suspect dilution of minority voting strength"); *Nash*, 1992 WL 165162, at *10 ("The precise number [of minority voters required for an effective minority district] is a question of fact that may differ depending upon the circumstances."); *Ewing v. Monroe County, Miss.*, 740 F. Supp. 417, 426 (N.D. Miss. 1990) (noting that range of 51-55% black VAP sufficient due to prior minority candidates' success in districts with less than 50% black VAP).

[23] Since 1984, Senator Theo Mitchell, who is black, has been continuously elected from Senate District 7 with a total black population of 50.23% and a black VAP of 45.31%. *See* SRAC App. 68. McKinley Washington, who is also black, was elected in Senate District 45, which is only 54.6% black in total population. Sen. App. 18a-20a. By contrast, Yancey McGill and John Land, both of whom are white, represent Senate District 32, which is 58.15% black, and Senate District 36, which is 63.24% black, respectively. Sen. App. 24a.

Appellants claim that the three-judge court ignored these factors and simply held that any district with more than 50% black VAP was sufficient to provide black voters with the opportunities required under Section 2. SRAC J.S. 25; Gov. J.S. 20-21. In fact, the three-judge court expressly noted that "beyond the use of voting age population, we have considered other factors, such as the presence of an incumbent in a district, in formulating our plans." SRAC App. 49. The court explained that, in a district with a black incumbent, "black voter turnout will be greater than if there is no incumbent running, which will, in turn be greater than if a white incumbent were running." SRAC App. 50.

The SRAC also complains that the three-judge court "refused to consider . . . extensive evidence of racial bloc voting," evidence that the SRAC claims showed that a district with a 50.1% black VAP would not satisfy Section 2. SRAC J.S. 25. To the contrary, the three-judge court did consider the expert testimony offered by plaintiffs and concluded that "the extent to which voting is polarized in South Carolina remains an open question and will certainly vary from locality to locality." SRAC App. 56. In view of *Gingles*' requirement that evidence of racially polarized voting must be district-specific, 478 U.S. at 59 n.28, and the deficiencies in the expert testimony, *see supra* p. 7 and note 8, the court's finding was unquestionably correct. The court nonetheless accepted the parties' stipulation that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The three-judge court's decision not to draw all of the majority black Senate districts advocated by Appellants was not based on a lack of evidence of racial bloc voting, but rather on evidence demonstrating that the proposed districts were not sufficiently compact, as required by *Gingles*, 478 U.S. at 50.

In determining whether a district is compact under *Gingles*, courts take a "functional" approach, rather than

relying on the shapes of the districts.[24] Under a functional approach, "a district is sufficiently geographically compact if it allows for effective representation," *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988), *i.e.*, if the citizens within the district are able "to relate to each other and their representatives" and the representatives are able "to relate effectively to their constituency." *Wilson*, 823 P.2d at 574. In addition, "the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication." *Id.* at 549. "If a district is so spread out that no sense of community exists, then that district is not sufficiently compact." *DeGrandy*, slip op. at 18.[25]

In keeping with the functional approach to compactness, the three-judge court recognized that "the color of

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[24] *See generally DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131, slip op. at 8 ("[T]he proper focus of any geographic compactness analysis is upon the size and relative concentration of the minority population, rather than upon the size or shape of the district."); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) ("By compactness, [*Gingles*] does not mean that a proposed district must meet . . . some aesthetic absolute, such as symmetry or attractiveness."); *Wilson*, 823 P.2d at 574 ("Compactness does not refer to geometric shapes . . . ."). The functional approach to compactness is consistent with both the legislative history of Section 2 and Justice Brennan's opinion in *Gingles*. 478 U.S. at 48 n.15.

[25] The compactness requirement becomes more important in the case of single-member districts than in the case of multi-member districts or at-large elections. The reason is that, when plaintiffs challenging a multi-member district ask the court to divide it into single-member districts, the proposed districts by definition will always be smaller in area and therefore no less compact than the multi-member districts they replace. By contrast, when plaintiffs challenge a single-member districting plan and ask the court to draw different single-member districts, there is no similar limitation. The proposed districts may stretch all over the State and therefore may be substantially less compact than the districts they replace. In such a situation, the court must take particular care to observe *Gingles*' compactness requirement.

one's skin, in and of itself, does not create a community of interest. Rather, a community's views on crime, employment, education, police brutality, urban sprawl, or urban blight may be just as indicative of a community of interest as whether the members of the community are predominantly black or white . . . ." SRAC App. 54-55 (footnote omitted); *see Wilson*, 823 P.2d at 574-75 (functional compactness "speaks to relationships that are facilitated by shared interests"); *see also* Sen. App. 8a (Senate criteria for drawing districts meant to promote "districts where the people that are in the district will have . . . a collective sense [that] they're a district and they know the issues that are going on that affect that district").

Appellants apparently believe that, so long as it is physically possible to draw a district that is at least 57% black, Section 2 requires that district to be included in any court-drawn plan, regardless of whether it is functionally compact. Such an approach runs directly contrary to the geographical compactness mandate of *Gingles*. 478 U.S. at 50. As the court observed in *Watkins v. Mabus*, 771 F. Supp. at 805, "*Gingles* does not interpret § 2 of the Voting Rights Act to require the creation of majority non-white districts that are not geographically compact." *See also Wilson*, 823 P.2d at 566 ("[S]ection 2 need not control formulation of plans where minority voters are not, functionally, geographically compact").

Contrary to the SRAC's claim that its evidence of compactness was "conceded by the parties and the court," SRAC J.S. 6 n.6, the evidence demonstrated that the additional districts advocated by the SRAC and the Governor did not meet *Gingles*' compactness requirement. As discussed above, the Savannah Valley district (District 10) strung together disparate communities of interest in seven different counties. *See supra* pp. 8-9. The district proposed by the SRAC north of Columbia (District 15) fractured a compact predominantly black area into two dis-

tricts (Districts 15 and 17) and, by splitting precincts, added disparate groups of black voters with no community of interest to increase the black percentage of the population in both districts. *See supra* p. 9. The majority black districts proposed by the SRAC and the Governor in eastern South Carolina likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. *See supra* pp. 9-10.

Appellants complain that, in determining not to draw additional majority black districts, the three-judge court improperly deferred to "the state policy of recognizing county lines." SRAC J.S. 28; Gov. J.S. 22-25.[26] Contrary to Appellants' claims that the preservation of county lines somehow runs counter to the policies underlying Section 2, courts have held the preservation of political boundaries, such as county lines, promotes the creation of districts encompassing communities of interest in conformity with the compactness requirement of *Gingles*. As the special masters who drew reapportionment plans for the California Supreme Court explained, preservation of the "geographical integrity of any city, county, or city and county" when drawing legislative districts (as required by that State's Constitution) is entirely compatible with Section 2.

> [U]se of [the California constitutional] criteria reinforces the [Voting Rights] Act's guarantee to minority groups to have an equal opportunity "to participate in the political process." . . . [P]olitical effectiveness can be enhanced by membership and

[26] Appellants' argument cannot be that the three-judge court refused altogether to break county lines in order to enhance minority voting strength, as the court did precisely that in fashioning a majority black Congressional district. SRAC App. 84 & n.78. What Appellants are really contending is that the court should have crossed even more county lines in order to create additional black majority districts in the Senate and the House. This is, essentially, a rehashing of Appellants' maximization argument and should be rejected as such. *See* Argument III, *supra*.

> participation in community affairs: candidates for public office can be recruited and nurtured, local media may be better utilized . . . [and] grassroots organizing and campaigning are more viable.

Wilson, 823 P.2d at 574-75 (citation omitted).[27] Here, by minimizing cuts across county lines, the three-judge court's plan for the Senate served both state policy and the requirement of "racial fairness." SRAC App. 70.[28]

The SRAC's argument that the three-judge court "chose to honor 'South Carolina's traditional and legitimate policies' of protecting incumbents," SRAC J.S. 28, rather than apply the principles embodied in Section 2, is equally

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[27] *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 11-12, 15; *Magnolia Bar Ass'n, Inc. v. Lee*, No. J90-0413(B), slip op. at 29-30 (S.D. Miss. July 15, 1992) (to be reported at 793 F. Supp. 1386) (copy lodged with this Court); *see also Connor v. Finch*, 431 U.S. 407, 430 (1977) (Blackmun, J., concurring) (noting in the context of a challenge on racial fairness grounds to a court-ordered redistricting plan that "[w]here there is an established policy of respecting political or natural boundaries in districting, then I believe that a court may best avoid any appearance of partisanship by using those boundaries as much as possible in its districting"). *Cf. Good v. Austin*, No. 91-CV-74754DT, 1992 WL 173862, at *5 (E.D. & W.D. Mich. July 28, 1992); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992); *Wesch v. Hunt*, 785 F. Supp. 1491, 1498 (S.D. Ala.), *aff'd mem. sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992); *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982) ("[P]olitical subdivisions should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation.").

[28] The three-judge court also noted that its plan minimized the number of split precinct lines. While recognizing that this was "primarily an issue which effects administrative convenience, splitting precincts also has the effect of confusing both voters and potential voters; thus, in some instances, serving to abridge the right to vote or to have their vote counted." SRAC App. 64. Each of the additional majority black districts proposed by the SRAC and the Governor contained split precincts, and the testimony at trial showed that such splits adversely affect black turnout, *see* Sen. App. 2a-5a, thus reducing the "electability" of these districts.

unavailing. In fact, the three-judge court expressly stated that "[a]lthough protecting constituent-representative relations may be a legitimate concern for a legislative body fashioning a plan, this court must act circumspectly and without taint of arbitrariness." SRAC App. 64 (citations omitted). Accordingly, the three-judge court's apolitical treatment of the incumbency issue was entirely proper.[29]

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[29] For example, the court looked at the extent to which the placement of more than one incumbent in a given district indicated "apparent partisan considerations." SRAC App. 65; *id.* at 65 n.61 (criticizing Governor's plan for Senate because it paired ten Democratic incumbents); *see Prosser*, 793 F. Supp. at 871 (noting that court-drawn plan was less partisan than plans submitted by parties because it pitted the least number of incumbents against each other). The court also considered incumbency to determine what impact the race of the incumbent would have on "the effectiveness of the black voting age population." SRAC App. 49-50. The court observed that, to satisfy Section 2, a smaller percentage of black voters was required in a district with a black incumbent than in an open district or one with a white incumbent. SRAC App. 49-50; *see Nash*, 1992 WL 165162, at *10 (noting that determining the requisite minority population size is a multi-factor inquiry).

CONCLUSION

For the reasons set forth above, the appeal and the cross-appeal should be dismissed or, in the alternative, the judgment of the three-judge court should be affirmed.

Dated: October 2, 1992

Respectfully submitted,

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee
South Carolina Senate

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APPENDIX

ARRINGTON—CROSS

* * * *

[Arrington Trial Transcript, p. 27] Q. (By Mr. Howe, counsel for the Senate): And when we look at your report you make some reference to the studies that you have done, you chose as the benchmark for racial polarization in the state the race between Campbell and Theo Mitchell?

A. I did. Simply because it was a statewide race which we could apply to a number of different districts.

Q. And from your perspective, from your analysis, that's the one race you used on these senatorial districts [i.e., the three black majority districts], isn't it?

A. It the only one I used on those three, I did look at a number of other—a number of other Senate races and several [28] House races.

Q. But on the three that you are talking about where the Republicans are creating these districts?

A. That's correct.

Q. You only used that race?

A. I only used that race.

Q. One race?

A. That's correct.

Q. You say in your report these figures are fragmentary and are less than totally reliable, don't you?

A. Yes, the court would not want to base conclusions about racial polarization solely from the data that I presented here. I was well aware that Dr. Loewen was going to come and present information, and since that time I have also seen a very extensive body of incomplete but nevertheless persuasive evidence about racial polarization from Dr. Ruoff's analysis.

Q. Well, when you wrote this, what you wrote a week ago?

A. Uh-huh.

Q. What you were saying when you said that was, "I got some information, but I don't want you to base any

of your decisions on it because it is fragmentary and less than totally reliable?

A. Yes, and when I wrote that a week ago you will notice there is several references to Loewen in that, I knew the Loewen data would be presented.

* * * *

[30] Q. (By Mr. Howe, counsel for the Senate): You worked at the local level in local politics?

A. I have.

Q. I think we all consider that in the trenches?

A. In the trenches.

Q. No doubt about it?

A. No doubt about it.

Q. And that's being there on election day and that sort of thing?

A. Yes, I was the chairman of the Mecklenburg County Board of Elections for six years and a member of that board for 12, so that's very much in the trenches.

Q. You familiar with the problems associated with splitting precincts?

A. Yes.

Q. That does create problems on election day?

A. Yes.

Q. And those problems are burdensome, not only the top, say the chairman level where you are, but particularly burdensome on the people in the [polls], aren't they?

A. They are.

Q. Voters who come often have small amounts of time set aside to vote and can be easily frustrated [into] sort of giving [31] up their franchise, can't they?

A. That's correct.

Q. And if the lines are too long or they are having to try to locate themselves on a map, any little frustration like that can significantly lower voter participation, can't it?

A. Yes.

Q. And that should be avoided, shouldn't it?

A. Should be avoided.

Q. And you would see and agree with me that the splitting of precincts on election day in the face of the individual going to the [polls] to vote can be and often is very inhibiting?

A. Yes.

Q. And should be avoided if it possibly can?

A. Should be avoided if you can avoid it without committing a greater violation.

Q. Where I'm heading is this, if you have been helping with that county you have been a part of some get-out-the-vote movement, haven't you, encouraging people to register, encouraging people to participate—

A. Oh, yes, absolutely, sure, absolutely.

Q. Sure. I mean that's when you have ads and say, you know, "exercise your right," and that's not directed Democrat or Republican, it's "doggone it, get out there and vote?"

A. Our experience in similar situations in Mecklenburg County is that when you are faced with a situation where [32] you have a split precinct, you have to go to extraordinary lengths to prepare for the problems it's going to cause, but it can be handled.

Q. But splitting precincts causes and requires some extraordinary lengths to try to deal with it, to use your language?

A. There's no question that that is true.

JUDGE HAMILTON: Mr. Glenn, Mr. Holleman.

MR. GLENN: Yes, sir, I didn't knew he's through.

MR. HOWE: I'm sorry.

CROSS EXAMINATION

BY MR. GLENN (counsel for the Lieutenant Governor):

Q. Yes, doctor, just on that very subject matter that Mr. Howe was just questioning you, who is more likely to be disadvantaged by the confusion of—that arises according to your testimony from splitting precincts, black voter[s] or white voter[s]?

A. Black voter[s].

Q. So, the consideration given to avoiding splitting precincts comports with the Voting Rights Act of 1965, does it not?

A. Taken all by itself, yes, sir. Now, I can explain it. Sure, if you take any one element like that, absolutely —if for example somebody specifically went through and split or otherwise created confusion in black precincts and not in [33] white precincts that would be a clear violation of the Voting Rights Act, no question about it.

You simply have to balance many different interests here. The first interest in drawing districts is the constitutional one, one person one vote, that will require splitting some precincts. The second requirement is a federal statutory requirement, the Voting Rights Act, and unfortunately that will require splitting some more.

The election commissions will simply have to adjust to that if the court decides you have to split some precincts to follow the Voting Rights Act, and I think you do.

Q. Providing meaningful access to the political process to exercise the franchise is part of the—for citizens of all races, and to protect the minority race is part of the design of the Voting Rights Act; is that correct?

A. Yes.

Q. And voter confusion as a result of splitting precincts is more likely to deny access to a black voter than a white voter?

A. Yes. But again, the denial that comes from fracturing black majorities and putting them in districts where they cannot conceivably be an important influence in that district is a much greater denial than a little bit of confusion on election day.

Q. So, what we have to do is a balancing between the [34] legitimate non-discriminatory state interest in the election process?

A. Yes, you have to balance them, you have to figure out which are the most important.

Q. And unfortunately we have now come to the point where we have laid that at the feet of three judges that

constitute this court to do that balancing, is that where we are in this litigation?

A. Yes.

* * * *

[68] BY MR. HOLLEMAN: (counsel for the South Carolina Democratic Party):

Q. . . . you have made a point of benchmark of the governor's race in the general election in 1990, but you do not have the Democratic primary for governor in 1990, do you?

A. No, I don't.

Q. Which was a statewide race, correct?

A. That's correct.

Q. With a black and white candidate?

A. That's correct.

Q. Both of which were state senators, correct?

A. Yes.

Q. Do you know that the information for that primary is published in the Annual Report of the South Carolina Election Commission?

A. By precinct.

Q. No, by county?

A. I knew it was published by county.

[69] Q. And do you also know—

A. I do not do—I'm sorry, I did not do county by county analysis, I rely on precincts.

Q. Do you also know that the electorate in that primary was approximately 57 percent white?

A. If you say so, I did not know that.

Q. Do you also know that Senator Mitchell won that primary by substantial margin?

A. That I did know.

Q. And that might be a benchmark election too; might it not?

A. It would indeed.

* * * *

COUICK—DIRECT

* * * *

[Couick Trial Transcript, p. 150] Q (By Mr. Howe, counsel for the Senate): Now, as—when the plans were

exchanged in December and subsequently, there have been additional areas that have been pointed to as [prospective] minority majority districts?

A (By Mr. Couick, Director of Research for the Senate Judiciary Committee): Yes, sir.

Q I would like to go through those with you and we'll start with what we will call the Savannah Valley. Which number is that? Is that ten?

A Yes, sir, that's ten in most of the plans—in all the plans that's ten, yes, sir.

Q Now, did the [Senate Judiciary Committee's] Subcommittee [on Reapportionment] create a [151] majority/minority at ten?

A No, sir, they did not.

Q Why not?

A In all three—there are three plans, as best of my memory, that have a District 10 in them. I believe it's the S.R.A.C. proposal, we kind of call SRAC. The Governor and the Republican Party all have a District 10. All of them are a little bit different. The Republican Party and the Governor's are more black than the S.R.A.C.'s.

Q That doesn't come as any great surprise to anybody.

A We found—or the Subcommittee found based upon staff's review that particularly with the Republican party and the Governor's proposal, there were a number of precincts that were split in the particular district. And they were split mainly in minority precincts that would only add to the voter confusion that we had heard a good bit of testimony about at the [Subcommittee's hearing on] criteria [for drawing redistricting plans] . . . and at other times.

Q Let's digress one second on that. Was there testimony at the Subcommittee hearings specifically on the problems associated with voter precinct splits?

A Yes, sir. It came from almost every quarter in that—committee meetings in particular, we heard from

[152] not only people that you've heard about this week, but we also heard from folks like Senator Joe Wilson saying that there [was] confusion that was caused by precinct splits.

Q In addition to that, did you do some research by calling the Democratic and Republican parties?

A I personally did not do that, but I requested my staff who gave me a report back to call the Democratic Party, the Republican Party and to the State Election Commission, and ask for a recent history of election protests and what most of those precincts—I mean protests involved, and particularly had there been any protests that involved split precincts. And the response that came back was most definitely yes. In fact, most protests that—where there were split precincts within the district had some relationship to the splits.

Q Was it determined—I'm going to go back to 10. Was it determined that the various proposals for District 10 did in fact violate the Senate criteria?

A Yes, sir. For several reasons, we never were able to determine that an electable district could be drawn in that area. We took into account the great geographic stretch of the districts. And that wasn't the determining factor, but when you combine that with [153] the number of split precincts that the splits occurred mainly in heavily black precincts, that there were no unified communities of interest throughout that district, and there was no core of an existing district that that district was built upon, we determined it was going to be hard for that district to be electable at that percentage drawn.

Q Now, let's talk about these districts and I'm not going to do this on each of these districts, I promise.

We agree that the first criteria is equal—one man one vote, and the second one is the Voting Rights Act?

A Yes, sir.

Q How did that play—I mean, do you go to two and then stop? How—contiguity, communities of interest, constituent consistency, precinct boundaries, etc., how are those—and compactness, how do they play together, how

did the Subcommittee play them together in the decision making mix?

A The criteria that the Subcommittee adopted are fairly neutral criteria. I think that if you look at other states and other submissions by the Republican Party and others, they're meant to build good districts, good electable districts, districts where [154] the people that are in the district will have an idea of a collective sense, they're a district and they know the issues that are going on that affect that district.

They're able not only to elect a representative from a cohesive compact district, but they are able to affect that representative once he's elected and offer him comments and have kind of a core sense of issues they're interested in that he'll have to respond to.

Q What I'm getting at is several people have said that you come to the Voting Rights Act, you apply maximization and you don't go further. Is that how the Subcommittee did it?

A No, sir. As I was getting to, those neutral criteria that were meant to create electable districts for any type of the 46 senatorial districts have the same impact in a minority district, a black majority electable district, whatever you care to determine.

It was meant to make those districts where they could be electable, where like communities of interest would be something that would be an asset or an added asset to that district. That if you had a district that was nominally a black district, if it was in a community of interest or in several communities of interests that were related, that would make it a higher quality district in terms of the black representative [155] that was elected being able to participate effectively in the legislative process and also in terms of the folks from where he was elected being able to have input in important and quality input into what he did.

Q What did the Subcommittee determine about the proposed minority/majority district in that area?

A That it was not elect[able].

Q Now, what did it determine as it related to the criteria?

A As to each criteria?

Q Just generally.

A In consideration of black majority, [putative] black majority districts, the Subcommittee never divorced the Voting Rights Act compliance with the other criteria. We never really got to the point of considering the other criteria. Those were not important.

They wanted if possible to draw a black district if it met the first two in terms of equal population and Voting Rights Act compliance, but they viewed the other criteria to have an impact on that Voting Rights Act compliance.

So to the extent that you didn't have a compact district, or it wasn't cohesive or there were no communities of interest, no core district, they didn't go beyond that point. So, they felt like if it did not [156] comply with those first two criteria, it was not electable.

Q When you look—one of the next areas of concern was Georgetown [County] as a prospective district. What district number was—

A Thirty-four, I believe in most plans have denominated that District 34.

Q And did the Republicans, Governor and the N.A.A.C.P. [SRAC] propose a district there?

A In fact, I believe the Lieutenant Governor proposed a district in that area as well.

They all are a good bit different. The Lieutenant Governor tends to take the Senate plan and extend it and adjust some of the other districts beside it.

The N.A.A.C.P.'s way of drawing the district is to shift over Districts 32 and 36 and take part of the black population in Williamsburg County in order to draw District 34.

I believe the Governor and the Republican Party had a little bit different iteration where they pushed District 30 up into Dillon County, and then used some of

the population left over from that shift in order to draw the District 34.

Q What did the Subcommittee determine in that area?

A The determinations on those—on those plans were [157] a little bit different than District 10, because there were so many different ways of trying to draw District 34.

As to the Republican Party, and I could be mistaken that both were alike, but I believe the Republican Party and the Governor were very similar. In terms of their using the black population in Dillon County for District 30, we had ample testimony from Senator Gilbert [the black incumbent in District 30] that that was not a type of population that would give him what he called an electable district.

That—for that reason, you were merely taking one district, District 30, and making it unelectable in order to try to achieve an electable district in District 34. So, it's kind of a trade-off. And I feel that to some degree, the District 34 [in the Governor's plan] was not as electable as the District 30 that was drawn by the Senate.

In terms of the Lieutenant Governor['s] proposal, the V.A.P. is fairly low on that district. I don't believe that it would be an electable district for a number of reasons, including that one reason is it stretches essentially from outside Dillon County down almost into Charleston.

Q And in trying to create a minority district in [158] that area, what did it do to Williamsburg County?

A Well—and that was kind of the approach taken by the N.A.A.C.P. They shifted over and divided Williamsburg County into 4 different districts. And by doing that, they fracture what's kind of already a cohesive core of a[n] [existing] district [District 32] in order to draw that District [34].

And they shifted over also into Clarendon County in District 36, and they kind of—I believe the Subcommittee view, from my understanding of the Subcommittee view, by doing that, they took what were two very highly elect-

ab'e black districts [Districts 32 and 36], and by fracturing every one of them, all three of them, they left open the question whether any of them were electable or not.

Q Now, the next would be up in the Fairfield area [north of Columbia].

A Yes, sir.

Q Now, the Senate added the eleventh district in the Fairfield area, and I believe several of the plans proposed an additional district in that area.

A Yes, sir.

Q And what was the Subcommittee's position on that?

A Mr. Howe, once again, all these plans are a little bit different. The Lieutenant Governor only drew one district in the Fairfield area. That district had a [159] lower V.A.P. than that drawn by the Senate. And for that reason, the Subcommittee felt like that we—the Subcommittee had done a better job of establishing an electable district within the confines of that compact area. In addition, the Lieutenant Governor['s] District, I believe, goes over and takes part of Spartanburg. It still has a lower V.A.P.

And I'm not looking at either the Republican or the Governor's [actually the SRAC's] plans, but the best of my memory is both of them draw two districts that are essentially divided by a line somewhat parallel to I-77 And that that—you can essentially take one district on the right of I-77 that runs from Rock Hill to Lancaster to Camden down into Columbia, taking part of an existing district, District 19, currently occupied by Senator Kay Patterson [who is black]. That's one district out of that area.

They draw another district [District 15] that starts in Fairfield County, runs up, I believe both of them or one of them goes into Newberry, then into—these are cities, City of Newberry, City of Union, and then over into Spartanburg before coming back into the City of Rock Hill, the City of York, and in fact I believe one may go into the City of Gaffney for a small black population.

Q Did the Subcommittee believe it was possible to be [160] true to the criteria and draw two minority districts in that area?

A No, sir. And with the last plans I described that draw two districts, the Subcommittee's view was you had essentially a core district there that could be drawn that was compact and cohesive, a black area. That by doing what these other parties had done, you had fractured that cohesive compact district in two and drawn two districts [Districts 15 and 17] that were highly unlikely to be . . . electable because of the disparity, geographic and in terms of the—how the folks kind of thought of their communities of interest. You would put disparate groups together.

* * * *

[164] Q (By Mr. Howe): Have you run an analysis of the plan other—plans of other submissions involving precinct splits?

A (By Mr. Couick): Yes, sir.

Q And how many does the Governor's plan as amended split?

A The Governor's plan as provided to staff on 12 23 91 as amended most recently contains 122 split precincts.

Q And how about the Republican Party?

A As—it was a proposal made on 12 23 91 as recently amended to include some cleanup, I believe it was back earlier in the year, included 145 splits.

[165] Q And how about the [SRAC]?

A Their submission of 12 23 91 included 65 splits.

* * * *

We have also done an analysis of the total voting population with each of those splits as well.

Q (By Mr. Howe) What does that show us?

A That if you look at the Governor's plan for the Senate, and this one is the same plan I was just describing, its population within the split precincts is 290,730 people. That's approximately 8.4 percent of the total

population of the state. Of these precincts, there are 35—excuse me, 34½ percent black population.

If you look at the Republican—excuse me, the [166] S.R.A.C., N.A.A.C.P., the total number of population within their split precincts is 170,534. That's roughly five percent of the total state population. Of those precincts split, the population is 26.7 percent black.

* * * *

LOEWEN—CROSS

* * * *

[Loewen Trial Transcript, p. 73] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Okay. And as Mr. Howe asked you, I believe you said you were not aware that District 30 later elected a black senator, is that correct, in 1988?

A. That's correct.

Q. Are you aware that that black senator was elected in a runoff after having finished second in the first race?

A. I am not.

Q. And as to district 45, I believe you also said you were [74] not aware that it later elected a black senator, Senator McKinley Washington; is that correct?

A. In general, just to avoid any drawn out questions, I'm not prepared to testify about any election after 1984 or any candidates after that date.

Q. So, I guess then you are not aware that Senator Washington received approximately 60 percent of the vote, both in the democratic primary runoff and in the general election against white candidates?

A. That's correct.

Q. And looking at District 32, if I could for just a minute, I believe that is the district that includes Williamsburg County, which has been represented by Senator Frank McGill and his son Yancey McGill—are you aware of that fact?

A. No, sir.

Q. You are not aware. But I guess as you see your numbers show that Senator McGill, if you will assume

with me for the moment that was the candidate, received almost 50 percent of the black vote, correct?

A. Yes.

Q. And are you also aware, since I see you have analyzed prior Williamsburg County elections, that if not all, virtually all of the county wide elected officials in Williamsburg County, except for Senator McGill, are black?

A. I do not now remember that, but it's—I don't contest [75] it.

Q. Including, for example, the Sheriff and the Treasurer of Williamsburg County?

A. Okay. If you say so, I believe you.

Q. And that Senator McGill was the only county wide elected white official in that county?

A. Could be.

Q. So, I guess when we look at the three senate districts you have analyzed for 1984 and forward, we find two districts which have since elected, if you assume for the moment these facts are true, black senators, and one district in which 50—the senator who happened to have been white got 50 percent of the black vote, and the other county wide elected officials are black.

Would you say that these, assuming those facts, would you say then that these are districts where the black population of those districts are well able to elect candidates of their choice?

A. Based on what you told me has happened since '84, that seems to be a reasonable statement.

Q. And those are the only districts you have analyzed from '84 forward?

A. Yes.

* * * *

[88] Q. (By Mr. Hunter, counsel for the Governor): Okay. Have you made a study of blacks that have been successful in their elections to the general assembly of South Carolina?

A. No.

* * * *

[101] Q. (By Mr. Hunter): Assume the court should find that it needed to draw remedial districts to assist black communities to have equal opportunity to elect candidates of their choice to the legislature, how would you advise the court or the drafters with regard to the number of seats that should be in any one plan?

A. I would probably look at the various plans—

JUDGE HAMILTON: Now wait a minute, if I understood your question, the number of seats that should be in the Senate plan, the House plan, or the congressional plan is not determined by this court.

MR. HUNTER: The number of minority remedial seats, Your Honor—

[102] JUDGE HAMILTON: Well, that's not what you said. All right.

BY MR. HUNTER:

Q. I'm sorry. The number of remedial seats that should be included in the plan, not the gross total number of seats.

A. Generally, I have been in a position of—when I have been looking at plans, I have been looking at plans already drawn. I have, in a few cases, drawn—been commissioned and involved in drawing my own plans. But generally I would look at the two plans—let's say—I think you mentioned 11 and 14?

Q. 11-let's say 11 and 15.

A. 11 and 15, excuse me. And I would first want to advise the court as to whether I thought all 11 seats were in fact reasonably winnable by minorities, or all 15 seats were reasonably winnable, and I would no that through the analysis that I have already mentioned to you.

JUDGE HAMILTON: Have you done that with respect to any plan that is going to come before this court?

THE WITNESS: No, sir, I have not looked at any plan, no plan has been provided me.

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LOEWEN—RECROSS

[128] Q. (By Mr. Holleman): Did I understand you to say in response to questions from over here that a—in your opinion a black population of 50 to 65 percent in South Carolina makes an electable black district?

A. Depending on the part of the state and it's electoral history, yes.

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RUOFF—DIRECT

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[Ruoff Trial Transcript, p. 8] Q. (By Mr. McDonald, counsel for the SRAC):

What were you asked to do in this case?

A. I was principally asked to assist in drawing maps for the House of South Carolina, House of Representatives, the South Carolina Senate, and the United States Congress.

Q. Now, what criteria did you use in drawing the maps that you drew?

A. The first criteria that we used was to try to build the largest number of districts in which African American citizens would have an equal opportunity, at least an equal opportunity to be elected.

In doing that we pay particular attention to insuring that those districts which currently have African American incumbents, that those districts were solidified, made sure that they were in good shape for reelection.

Secondly, that additional districts which were either currently a majority of African Americans but not really electable, not really districts in which African Americans had an equal opportunity to be elected, could be strengthened and buttressed to provide greater opportunity.

And then to, as much as possible, try to build the influence districts where African American citizens could have some influence on the—on the incumbents when they were elected who presumably would be white incumbents. We also—

Q. Let me stop you there if I may because I want to ask you about one of the earlier criteria that you

indicated that you [9] used. How—how do you define a district, as far as the Senate is concerned, which provides minorities an equal opportunity to elect a candidate of choice?

A. Well, there is—there is no absolutely precise definition. Our general rule of thumb was based on looking at the historical reality of where have black senators been elected, and taking that as a benchmark, seeing that in general the break point was at just about 58 percent.

In districts that were more than 58 percent, with one exception, with two exceptions, African Americans were —were elected, and generally below 58 percent African Americans were not elected. There were one or two exceptions to that.

So that for example in Greenville County, Senate District 7, which is just about an even 50/50 district, it has been Senator Theo Mitchell, an African American, has been elected in that district.

* * * *

[13] BY MR. McDONALD (counsel for the SRAC):

Q. Now, did you give any credence to the prior existing lines in drawing the plan for the Senate that you drew?

A. In general we did not. We did—as a general proposition we did not pay attention to incumbency where—where we were not particularly concerned about building a black district.

I think that on the whole we tried to sort of generally make it in the same area that the existing district was, although I don't think that when you start squeezing in the black opportunity districts that you can very closely do that.

Q. Now, did you attempt to draw the maximum possible number of districts that were majority black for the Senate?

A. The original exercise was to draw the maximum number to see that was possible, after that we then step back and said, "what are the best districts that we can

draw that will produce a fair plan, rather than the maximum number of majority districts?"

It turned out that the number happened to be the same, but they ended up being somewhat different, although they are not the same in our House plan.

Q. Okay. Now, did you take into account in any way whether or not the districts would have open seats, that is seats with no incumbents in them?

A. Particularly where we were trying to create districts [14] that would have black majorities that would be opportunity districts, we tried to create as many of those open seats as possible, oftentimes by putting white incumbents in districts together.

Q. You indicated, I believe, that you attempted to maintain the black majority districts that existed?

A. Yes.

Q. Why was that a concern?

A. Well, first of all to avoid losing what African American citizens already had. And so it was important to us that those districts, that we make sure that those districts were in good shape.

Q. Now, did you take into consideration the incumbency of non-minority members?

A. No.

Q. And why not?

A. We did not think that that was an important issue in terms of—of the interests of a African-American citizens in South Carolina.

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[15] Q. (BY MR. McDONALD, counsel for the SRAC): Dr. Ruoff, let me hand you Exhibit 111, which I think there has been no objection to, and ask you to explain briefly what that document is.

A. This—this document is a—on the first page it shows the existing senatorial districts and on the second page—and although it's not identified as such on here, I believe I recognize this as coming from the state statis-

tical abstract published by the budget and control board.

It also gives the Senate district numbers, total population, black population, percent black, the over 18 population black, over 18 percent black, over 18, and the percent variance—variation in the 1984 Senate plan.

Q. Now, did you consult that data in making your determination about what constitutes a district that would provide blacks an equal opportunity to elect a candidate of their choice?

A. Yes, I did.

Q. And in what way did you take that data into account?

A. Well, in looking at—in looking at this information, as well as taking into account racial polarization data, which we were aware, we wanted to see what's the real number it takes to get blacks elected, what are those districts in which [16] blacks can get elected and how black are they?

And in looking at that it was—it was fairly clear to us that those districts were generally 58 percent or higher.

Q. And do you know the blacks who are elected in those various districts?

A. Yes.

Q. Now, you indicated that generally blacks got elected in the—

MR. HUNTER (counsel for the Governor): Your Honor?

JUDGE HAMILTON: Yes, Mr. Hunter.

MR. HUNTER: I think it would be helpful if the witness would indicate 58 percent of what?

THE WITNESS: Population, total population.

JUDGE HAMILTON: VAP?

THE WITNESS: No, sir, total population.

JUDGE HAMILTON: Total population?

THE WITNESS: Yes, sir.

MR. HUNTER: He's saying total pop is what I understand?

JUDGE HAMILTON: That's correct.

BY MR. McDONALD:

Q. Can you identify with respect to individual districts and, their racial composition, where that general rule did not apply?

[17] A. Certainly does not apply with respect to Senate District 7 which was a 50.23[% black] district, population.

JUDGE ANDERSON: Is that Theo Mitchell's district?

THE WITNESS: Yes, Your Honor. And also with respect to Senate District number 45, McKinley Washington's district, which was a 54.60[% black district] in the 1980 census.

BY MR. McDONALD:

Q. Are those the only two exceptions to the general proposition?

A. Yes.

Q. What is the racial composition of the other senatorial districts which elected blacks?

A. Okay. Senate District 19, which is Senator Kay Patterson's district, was 58.75; Senate District 30, which is currently Senator Frank Gilbert is the Senator, is 59.30; Senate District 39, which is Senator John Matthews is the incumbent, 59.18; and Senate District number 42 in which Herbert Fielding is a Senator is 59.13.

Q. And that exhausts the number of Senate—

A. There are currently six black Senators, yes.

MR. McDONALD: We would move the introduction into evidence at this time of Exhibit 111.

JUDGE HAMILTON: Without objection.

THE CLERK: Plaintiffs SRAC Exhibit 111 in evidence.

* * * *

[29] A. (By DR. RUOFF): There is also created a new black majority district, an opportunity district in District 34, which includes Marion County, a piece of Horry County, a chunk of Williamsburg County, and some of Georgetown County. And that District 34 is 61.86 percent black.

One of the other things that we sought to do in drawing our plans was to increase the involvement of African-Americans generally in the political process by trying to make sure that, particularly in these low country [Coastal] districts, there would be black representation as much as we could get on as many delegations as we could get it, given the South Carolina practice of having the legislative delegation make many of the important decisions that affect African-Americans.

BY MR. McDONALD:

Q. More precisely, Dr. Ruoff, how would you go about trying to effectuate that concern?

A. Well, for example, Senator Matthews' district includes a piece of Orangeburg County, Dorchester County, Colleton County, Hampton County, Allendale County, and Bamberg County, as well as Barnwell County. Rather than—as for example, the Republican Plan that essentially cuts him off right here and also reduces the number of counties in which Senator McKinley Washington would be on the delegation, if—assuming he were reelected, or whichever person were reelected.

[30] Q. Are there any other examples of how you attempted to do that, that is to maximize black participation in the affairs of the county delegations?

A. Those are a couple of the places where we are most conscious of it, but it also goes to the question of whether we would have, as a general proposition, tried to reduce the number of counties that a—that a black—that an opportunity district might be. And our general inclination was to say that better to draw an opportunity district in more counties rather than in less.

Q. You used the phrase opportunity district, are you referring to a district in which minorities have an equal chance to elect a representative of their choice or something else?

A. That is exactly what we are referring to.

* * * *

[44] Q. (BY MR. HOWE, counsel for the Senate): When you started off drawing I think you told us that the first thing you wanted to do was to protect the existing minority majority districts?

A. Yes, sir.

Q. And once you decided where those were, at that point, after that, the lines became of no moment, the existing lines?

A. Well, the existing lines were not particularly of moment. As a general proposition, after we dealt with building the black districts we wanted to build, the opportunity districts, we generally followed what was in the Senate's Plan, not precisely by any means.

And once you start—you know, when you do cookie cutter and you built pieces and areas and then you start filling in the in between, it's impossible to just take any other plan and just say, "well, okay, let's lay it on."

Q. But you have been very frank with us that your interest, [45] your motivation has been maximizing black representation?

A. Yes.

Q. And so what you did was, you started off without this overlay, you started off with this just colored map under it and then you—

A. No, sir. No sir. I mean, we never used a thematic map as the base for our drawing. We happened to have other computer capabilities that give us the same effect. In fact, our system is a little better in terms of that because we can see population density but—

Q. What I'm getting at is, is that you would have taken and drawn in the black majority districts?

A. Yes, sir.

Q. And had in mind, "how can be enhance those how can we make those stronger?"

A. (Nods head in the affirmative).

Q. Then you would have looked at concentrations of black population and drawn districts for those?

A. Yes, sir.

Q. And the rest you followed the Senate Plan because the white folks could draw those about any way they wanted to?

A. Well, it's all—it's really more that it's just a lot easier to follow something that is already sitting there.

Q. Okay. Well, what was sitting there, there were several plans sitting there, weren't there? There wasn't just the [46] Senate's?

A. There was also—I think we had seen a Republican plan at that point. I think those are the only two other plans that I had seen.

Q. So, to the extent that the Senate is involved, y'all deferred towards the Senate Plan on the remaining lines that didn't interrupt with your lines?

A. As a general proposition, yes.

Q. Now, you mentioned that one of the things y'all tried to do—if not completely, at least minimize, was splitting precincts?

A. Yes.

Q. And that's something to be avoided if possible?

A. The ideal is not to split precincts unless you have to, and in some places we felt you had to.

Q. But that's why you talked about in terms of being able to get—get the variance down to zero, that you would have to split so many precincts it sort of wasn't worth—it wasn't a good idea?

A. I mean, that's—that definitely is one of the reasons not to try to go down to a zero variance.

Q. On balance, the tradeoff isn't worth it because splitting precincts does cause confusion and does have burdens at the polls on voting day?

A. Definitely so.

[47] Q. Now, as I understand your definition and some previous people's definition, what this is all about is trying to have the black community have some of their

representatives in the various community—in the various bodies, ours being the senate—

A. Yes, sir.

Q. —Officials, are elected officials of their choice?

A. Yes, sir.

Q. They really don't necessarily have to be black, do they?

A. No, sir.

Q. Nobody is proposing that, from a racial perspective, what we are looking for is the majority minority districts so that even under the polarization theory that whoever is up there is really up there speaking the black community's side of issues?

A. Right, and is more important than speaking—I mean, is chosen by black people.

Q. Now, in this state two of those are white?

A. Yes, sir.

Q. And they have particularly high black percentages in their districts, don't they?

A. Yes, sir.

Q. Who am I talking about?

A. Senator Yancey McGill and Senator John Land.

Q. And what are their percentages?

A. Let me dig around here a moment.

[48] Q. I'm supposed to give you this, I think this—

A. I found it.

Q. You got it?

A. Senator Land's percentage in the 1980 before redistricting was 63.24 and Senator McGill's was 58.15.

Q. Those are pretty solid minority majorities?

A. Yes, sir.

Q. And is it fair based on looking at that that both of those gentlemen in fact are the chosen representatives of the black community?

A. No, sir.

Q. And—

A. I have done specific analysis in District 32 which show that while there is substantial black support for

Senator McGill, that only 41 percent of the black population voted for him in the special election in which he was elected.

Q. And so in spite of your first criteria, which you testified was your first criteria, and that is preserving black minority majority districts that already exist, and you have stated that as your first criteria, you then choose to abandon that criteria and to stick these two districts together, don't you?

A. Well—

Q. And to run these two white incumbents against each other?

A. We did that, but the first criteria was not to protect [49] exising black majority districts but existing majority districts in which blacks were being elected.

Q. That's—that doesn't strike you as a little prejudicial?

A. No, sir.

Q. Okay. The Aiken District y'all propose is Number 10?

A. The—Number 10 includes a piece of Aiken, yes, sir.

Q. That's the Aiken to Anderson District?

A. Yes, sir.

Q. And I think you testified already that you don't even contend that to be a particularly compact district, do you?

A. Well, it certainly is not the most compact—

Q. It's not as compact as you would like it to be?

A. I don't think it's as compact as anyone would like it to be, given other circumstances in terms of where the black population lives in the State of South Carolina and how you need to draw lines to accomplish building districts in which African-Americans have an equal opportunity to elect representatives of their choice.

Q. Assuming they don't elect white representatives, because if you are going to do that then you have to change the whole Plan?

A. No, sir, I specifically already testified that in fact Yancey McGill was not the choice of the black community in Williamsburg County, and I have not done an analysis of Senator Land. I suspect we would find that although he has a [50] comparatively large black vote in his district, that it is not a majority black vote when—in a contest against a black candidate.

Q. Now, do you know how many precincts you split to create [SRAC District] 10?

A. I have not counted that up.

Q. Would you disagree with me that it was six precincts that involved 10,324 people, 72 percent of which were black?

A. That's—I'm—six precents probably sounds about right.

Q. How about 10,324 people, 72 percent of which are black?

A. That could be. I mean, it doesn't sound way off to me.

Q. Well, for the court's background, that's very normal information from the computer?

A. Sure.

Q. I mean, it's pretty amazing but you can sit down and move that little mouse around and figure that stuff out pretty quickly, can't you?

A. Not using a mouse.

Q. However you do it.

A. But you can figure it out pretty quickly.

Q. Georgetown is District 34?

A. Part of Georgetown is District 34.

Q. That's where you all propose to create another minority district?

A. Yes, sir.

[51] Q. And is District 32 next to that?

A. Yes, sir.

Q. Now would you disagree with me that you split three precincts in District 32 involving 3,642 voters, 81 percent of which are black?

A. That could be, yes.

Q. And then in 34 you split two precincts involving 1,591 voters, 85 percent of which are black?

A. When you are saying the 85 percent figure, I'm not clear on whether you are saying after we split it that the precinct was 85 percent in that district, or that it was 85 percent—they were 85 percent before they were split.

Q. I'm saying that of that 1,591 people, 81 percent of those people are black that you affected.

A. Yes, sir.

Q. Now, if you don't create the Georgetown District, Williamsburg County as a community of interest is left intact, isn't it?

A. It is possible to draw it intact, yes.

Q. If you don't create the 34th District, if you follow the Senate Plan and don't create that minority district, isn't Williamsburg County as a community of interest kept intact?

A. I don't recall whether all of Williamsburg is in—I mean, certainly the bulk of it is, but I don't recall whether all of it is.

[52] Q. And I'm not thinking so much about county lines but the community of interest of Williamsburg would be left intact. If you create District 34, Williamsburg County under your plan is cut into four separate districts, isn't it?

A. I belive that may be true, yes.

Q. And Georgetown, the community of Georgetown is cut into three separate districts to create 34, isn't it?

A. 34 and 33—is there a piece of 32 in there?

Q. Look and see, I have been so advised.

A. Yes, there is around the Andrews area.

Q. And so it's not just the pebble in the water when we say, "gee, let's put a minority district in Georgetown and call it 34," the pebble causes ripples, doesn't it?

A. Every change you make causes ripples.

Q. No doubt about it. And the ripples of 34 involve precinct divisions?

A. Some.

Q. Cutting the community of interest of Williamsburg into four districts and cutting the community of interest in Georgetown into three, those are just some of the ripples, aren't they?

A. It cuts Williamsburg into four, it cuts Georgetown into three.

Q. And it dramatically changes Districts 36 of Land and 32 of McGill, doesn't it?

[53] A. Yes.

* * * *

[70] BY MR. HOLLEMAN (counsel for the South Carolina Democratic Party):

Q. Now, I believe, for example you said if I recall, that your conclusion as to one of the upstate districts that has been drawn as a majority black district [District 15], that there was racial polarization based on your study of the Town of Gaffney [which is located in that proposed district]?

A. That was one of the pieces that went in, yes.

Q. Now, if I could just look at that study for a minute with you—and I believe that is the only study you did in connection with that one district?

A. Actually no, because I have also done analysis of Union which is—

Q. Union, all right, we will get to that, Union is in here too. The Town of Union and the Town of Gaffney. All right, let's assume for a minute the Town of Gaffney is relevant to [71] the entire Senate district.

A. Yes.

Q. Now, as I understand it if you read across here you have got the race of the candidate for the City of Gaffney, that says black, it's the first group. You have got the race they run for, school board?

A. Yes, sir.

Q. Then you have got the year, you have got the name of the candidate—and I'm going to skip over the ecological numbers, I'm just going to get to hard numbers—then you have got the percentage of the blacks who voted —who voted for that candidate, correct?

A. No, the percent who went to the polls that day. They may not have voted in that election.

Q. Okay. So, you've got the percent of the voters who went to the polls that day—

A. Yes.

Q. —who voted for that candidate?

A. Yes.

Q. Okay. And then you've got the percentage of the whites who went to the polls that day who voted for that candidate?

A. Yes.

Q. And then you got the total absolute number of votes that person got?

A. Yes, sir.

[72] Q. Okay. Now, I may be reading it wrong but let's look at '84 for—you go with '80 and '82 and go back to '74, but let's look at '88.

A. Yes, sir.

Q. Now, is this an at-large school board election in Gaffney?

A. I believe it was.

Q. All right. You know that Gaffney is a majority white town?

A. Yes.

Q. All right. Could you tell me who was the largest vote getter in the 1988 Gaffney school board election of either race?

A. I'm having trouble reading my copy so it might be Green, but I believe it is the black candidate.

Q. Mr. Roseman, right?

A. Yes, although that is a fairly common phenomenon that you encounter when you have—there's a couple of reasons for it, one of which is that there is a whole lot of white candidates so that the white vote gets severely split. The other phenomenon that you see is that, of course, the black voters cast almost all their votes that were cast for Roseman—

Q. All right. Well, let me—

A. And so frequently what happens is, there will be one black candidate in a—in an at-large situation that the white [73] community is prepared to support at some level, although almost never at a majority level, and you will see that even though Roseman has been three times elected in this study, that only once did he get a majority of the white vote.

Q. In 1984 Mr. Roseman got 52 percent of the white vote?

A. That's right. That's right.

Q. So, had only whites been voting he would have been elected?

A. Yes.

Q. And let's just follow this through a little bit more, in 1988 Mr. Roseman got 62 percent of the blacks who voted for him, right?

A. Yes.

Q. And 43 percent of the whites?

A. Yes.

Q. A bi-racial coalition?

A. Well, he got the votes from both sides of the aisle, yes.

Q. All right. And then if you turn over to look at your white candidate in that same election, is not the second highest vote getter in '88—

A. I think it's Green at the bottom.

Q. Mr.—no, let's see, okay, is Mr. Green—and Mr. Green got what—he's a white candidate, right?

A. Yes.

Q. What percentage of the black vote did he get?

[74] A. 65.

Q. He got 65 percent of the black vote?

A. Yes.

Q. Mr. Roseman got 62. And then what percentage of the white vote did he get?

A. 38.

Q. So, for the number 2 candidate, a higher percentage of the black people voted for him than the white people; is that correct?

A. In this one candidacy, yes.

Q. All right. Let's look at the third candidate. Let's see, who—

A. Mostetler.

Q. Mostetler. Now, Mr. Mostetler got 34 percent of the black vote and 41 percent of the white vote; is that right?

A. Yes, that's correct.

Q. Sort of equal, another bi-racial coalition, correct?

A. Well, it's not exactly equal but there is clearly votes from both communities there, although you need to recognize that blacks only had one opportunity to vote for blacks in that election—

Q. Well, now, if I look back at your list you have got three black candidates listed Copeland, Goodelock and Roseman (phonetic)?

A. That's correct, I'm sorry.

[75] Q. So, the blacks had several opportunities?

A. Right.

Q. And in fact they only voted 50 percent of the time for Mr. Copeland and Goodelock who were black, but voted 65 percent of the time for Mr. Green, who was white?

A. Yes, and that occasionally will happen. I mean, it is not our position that black folks are not—cannot vote for white folks and that they are not entitled to make their choice a white person, the question—

Q. They can elect—

MR. McDONALD: I object, let the witness finish.

MR. HOLLEMAN: Okay.

A. The question is, who is the candidate of choice of the black community? If you look, for example, at Republican primary data in—or Republican general—general election data for county council in Richland County, there is a black candidate, Gus Roberts—

BY MR. HOLLEMAN:

Q. I will ask you about that in a minute, but I would like to focus on one thing at a time, if I can, since you said Gaffney was your key to concluding, along with Union, that one district was racially polarized, let's focus on this. Not only do the blacks vote for the white candidate, but the whites are voting for the black candidate?

A. In that particular situation, yes.

[76] Q. And then if we look at 1984 again with Mr. Roseman, who apparently was the only black candidate for school board that year, he got, as you said before, over half the white vote. And again he was the top vote getter for the City of Gaffney; is that correct?

A. Where are we at?

Q. Your chart, Mr. Roseman in 1984, 52 percent of the white vote; is that correct?

A. Yes.

Q. And he was the top vote getter again?

A. Probably, yes.

* * * *

[79] Q. All right. Then, if we look at the City of Union [which is also part of the SRAC's District 15] in the 1986 city council race which you have picked out—now, the way I read that, Mr. Glenn, a black candidate—City of Union by the way is majority white; is that correct?

A. Yes.

Q. Mr. Glenn, a white candidate—I mean, a black candidate [80] was a leading vote getter for city council with 870 votes?

A. Yes.

Q. Now, one thing I don't understand is you have him getting 114 percent of the black, how did Mr. Glenn manage that?

A. One of a few things happened. One of the problems in doing an analysis of a place like Union is that you only have a small handful of precinct and so that

makes it a little more difficult—well, it makes it considerably more difficult to be very precise in your estimates, and also if upon occasion—if the relationship is not absolutely a straight line but somehow curves, then you will overestimate.

Q. Okay. Let's look at—I'm just sort of going through your data here, as I tried to last evening, look at Kershaw County?

A. Although I would point out to you while Mr. Glenn got basically all the black vote, he only got 22 percent of the white vote.

Q. But the black voters in the City of Union were able to elect the candidate of their choice?

A. In that election, yes.

Q. In a majority white—

A. Yes.

Q. —City?

A. Yes.

* * * *

[87] Q. [By Mr. Holleman, counsel for the South Carolina Democratic Party]: All right. Now, if we could turn for a minute to Williamsburg County because that is involving one of the senate districts here [District 34].

If you look at your data, it's correct to say that in general for county offices you have racial block voting, correct?

A. Highly polarized.

Q. Correct. But what makes this peculiar for a Voting [88] Rights Act case to make this point is that when you have block voting in Williamsburg County, the black candidate wins?

A. Yes.

Q. In fact, they win the Sheriff and Coroner—I mean, Probate Judge and Treasurer of Williamsburg County?

A. Yes.

Q. But there is an example—an exception?

A. Yes.

Q. And that is the McGills, correct?

A. Well, except that the McGills are not the candidate of choice of the black community, but the vote is split, and as a result the candidate who gets the majority—generally gets the majority of the black vote does not get—does not win the election.

Q. Well, when you say Mr. McGill and his father were not the choice of the black community, you are saying that he was—he was the choice, however, of 40 to 50 percent of the black communiyt, he and his father?

A. Yes.

Q. Correct?

A. Yes.

Q. And these statistics show that if the black community wants to vote as a block to elect somebody in Williamsburg County, they can do it and they have done it over and over and over again?

[89] A. No doubt about it.

Q. But for the Senate, when Mr. McGill is running against Mr. Pasley or Mr. Richardson, Mr. McGill or his father win?

A. That has been the experience, yes.

Q. And isn't the lesson from this not that a black senator can't be elected from this district, but that Mr. Pasley and Mr. Richardson can't beat Mr.—either of the McGills?

A. I think that that's true. But that doesn't mean that another black candidate couldn't.

Q. Might be able to beat them, that's right. If a better black candidate ran who maybe wasn't from Hemingway, was from Kingstree, he might be able to win. Isn't that a fact?

A. Yes.

Q. And in fact in Williamsburg County, the Democratic County Chairman is black and has been for some time; is that right?

A. I don't know who the Chair is now, Ken Kennedy used to be.

Q. Used to be. In fact, he was just elected to the House when Mr. Gordon's seat became open due to his conviction?

A. Yes.

Q. And Mr. Kennedy is black?

A. Yes.

Q. And his predecessor was Mrs. Selma Connors who was black, correct?

A. Could be.

[90] Q. And isn't it true that the vast majority of poll workers in the democratic primary in Williamsburg County are black?

A. I have—

Q. You don't know that?

A. I don't know it for a fact, it wouldn't surprise me in the least, but I don't know it for a fact.

Q. I guess my point is some people might look at Williamsburg County and say, "this is a poor county, poor black population affected by discrimination," correct?

A. Yes.

Q. That would be your conclusion socioeconomically, correct?

A. Yes.

Q. But at the same time this very same socioeconomically deprived black community is well able to exercise political clout when and where it wants to, correct?

A. It has been able to, yes.

* * * *

[93] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, let's—I would like to talk with you for a minute about the specific districts you have talked about. You mentioned this Savannah River District?

A. Yes, sir.

Q. And I believe you said your conclusion as to racial polarization there is not based on any of your analysis, you didn't analyze any—

A. I haven't analyzed any communities there, no, sir.

[99] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, in Georgetown County is another one of these areas you said you assumed was racially polarized, correct?

A. I don't believe that I testified to that but—

Q. Do you?

A. It would be consistent with the other things I have looked at on South Carolina.

Q. But you have not done any study of any areas of Georgetown County?

A. No.

Q. Now, I believe—are you aware of a Mr. Ralph Wilson who won the solicitor's race in Georgetown and Horry Counties this past time?

A. Yes, sir.

Q. And he is black, correct?

A. Yes, sir.

Q. And he won the democratic primary and the general election, correct?

A. Yes, sir.

Q. And the solicitorial district he ran in was, what, 30 percent black?

A. Yes.

Q. Includes that area?

A. (Nods head in the affirmative).

* * * *

[64] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, given the standard that you were using as I heard it described to Mr. Howe this morning, the standard you looked at is the percentage you thought that was necessary for a district to elect a black senator; is that correct?

A. Yes.

Q. Okay. And you said that number was 58 percent?

A. As a general proposition, yes, but, I mean, clearly there are a couple of exceptions.

Q. And you base that because you said historically most of the black senators who were elected were elected from districts that had 58 percent or more?

A. Yes.

Q. And by most you meant four of six?

A. Right, there haven't been a lot.

Q. Which meant two of six, one-third were elected from districts less than that as of the 1984 census?

A. Yes.

Q. And as of the 1990 census, in fact, isn't it true that Senator Kay Patterson's district has declined 56 percent?

A. I have not seen those, I have not done analysis. I know they exist, but I have not seen it.

Q. Well, if you assume with me that is a demographic fact [65] which can be checked, that would then mean half of the sitting black senators now represent districts that have below 58 percent in black population?

A. If that's true, yes.

Q. And I believe under the 1984 census, or the 1984 redistricting, there were four districts that had 50 to 58 percent of black population, correct?

A. I'd have to look at that.

Q. Two of those elected—have elected black senators, one being Senator Theo Mitchell and one being Senator McKinley Washington?

A. Yes.

Q. In fact, Senator Theo Mitchell's district as of 1990 has only 48 percent black voting age population?

A. That's about right, yes.

Q. And he has been elected twice to the state senate from that district; is that correct?

A. That's true, although Dr. Loewen's testimony showed that, you know, upstate districts are less polarized.

Q. I think he even assumed there wasn't a black senator from Greenville County, didn't he?

A. I don't recall him making that assumption.

Q. All right. Then also if you look at Senator McKinley Washington who is not from an upstate county?

A. No.

[66] Q. His black voting age population is 50.8 percent, isn't that right, today?

A. That could be.

Q. And then of the other two districts that had 50 to 58 percent, they elected Senator Marshal Williams and Senator Isadore Lourie, correct?

A. Yes.

Q. And I believe as you said you have been active in the political process of South Carolina, particularly the midlands, that's a correct statement, is it not?

A. Yes.

Q. And don't you know from your own experience that Senator Lourie is a senator who has attracted a great deal of support from the black community?

A. He has historically had considerable black support, yes.

Q. And in fact he's been a senator who has been viewed as extremely responsive to the needs and desires of the black community?

A. Senator Lourie is basically a good guy, yes.

Q. Okay. And in fact both Senator Lourie and Senator Williams and these other senators were elected from districts that were precleared by the Justice Department under the 1984 plan, correct?

A. I believe so. I'm not sure.

Q. Now, in fact, if we look at Senator McKinley Washington, [67] are you aware of the fact also that he received 60 percent of the vote in the democratic primary?

A. I have not looked at his primary vote total.

Q. Are you aware he was running against, I believe, Mullins McLeod, the brother of the retiring incumbent senator?

A. Yes.

Q. Who had once run for Congress himself, I believe?

A. I—it's my vague recollection that that's true.

Q. And then if we look at the districts that met in 1984 at least your criteria of above 58 percent, we find of those, two of them elected white senators?

A. Yes, sir.

Q. And I believe although you said that Senator McGill only got 40 percent, Yancey McGill, of the black vote, his father at one time got almost 50 percent, or 50 percent, did he not?

A. In one race he got right at 50 percent of the black vote.

Q. And I think that was in the 1984 race, was it not? Do you remember?

A. I have got it here.

Q. I believe if you look at the last page of your—

A. Right, that's where I'm looking at, that's 1984.

* * * *

[98] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): And then as to this district down here with Senator McGill and Senator Land, what you have done is you have moved one of them from a black majority seat and put them both in a neighboring black minority seat?

A. Yes.

Q. Would you have done that if they had been black senators?

A. No.

Q. You did it purely because they are white senators?

A. And because it allowed us to create an open seat in which a black candidate could be elected.

Q. But if there had been a black senator there you wouldn't have tried to create an open seat?

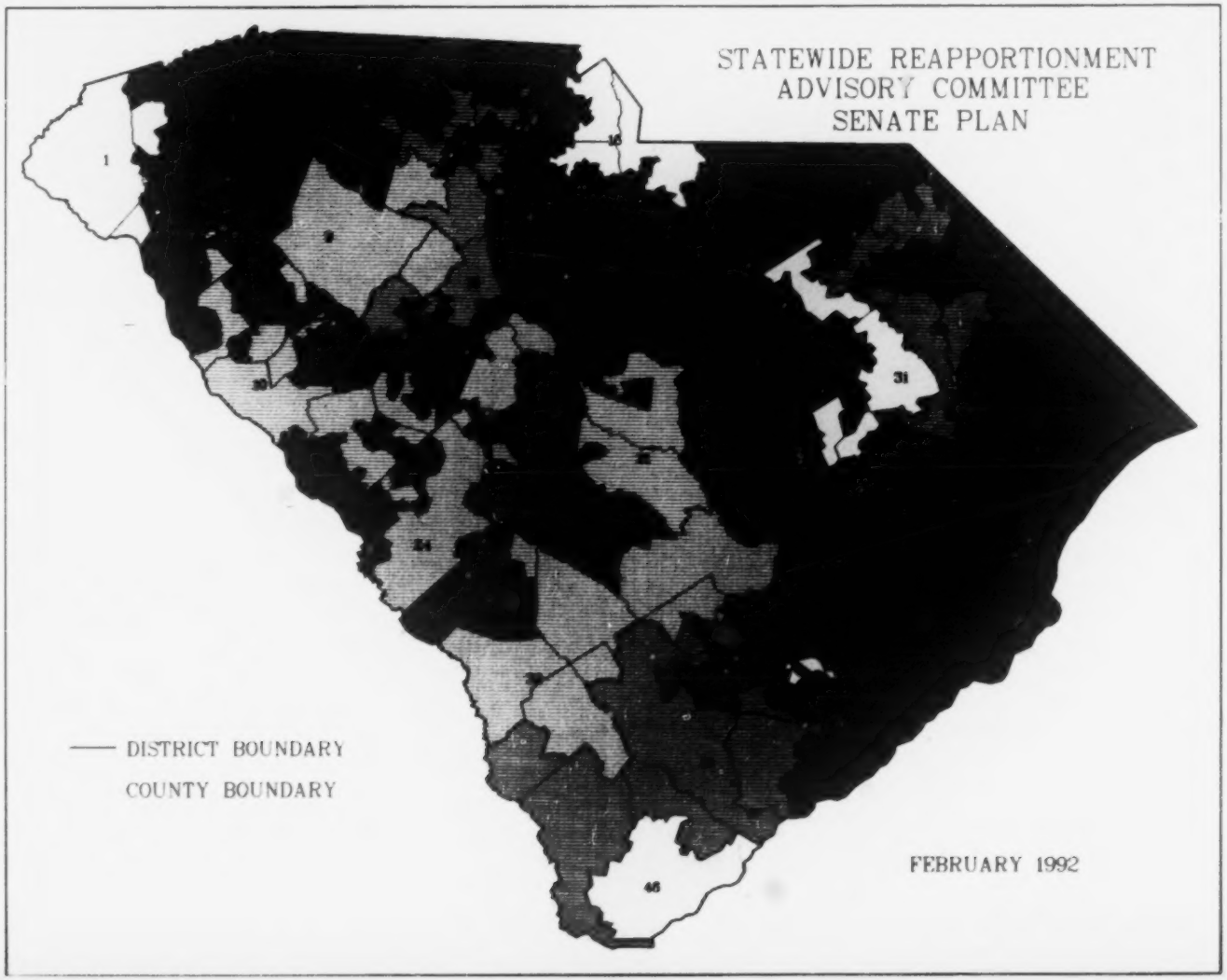
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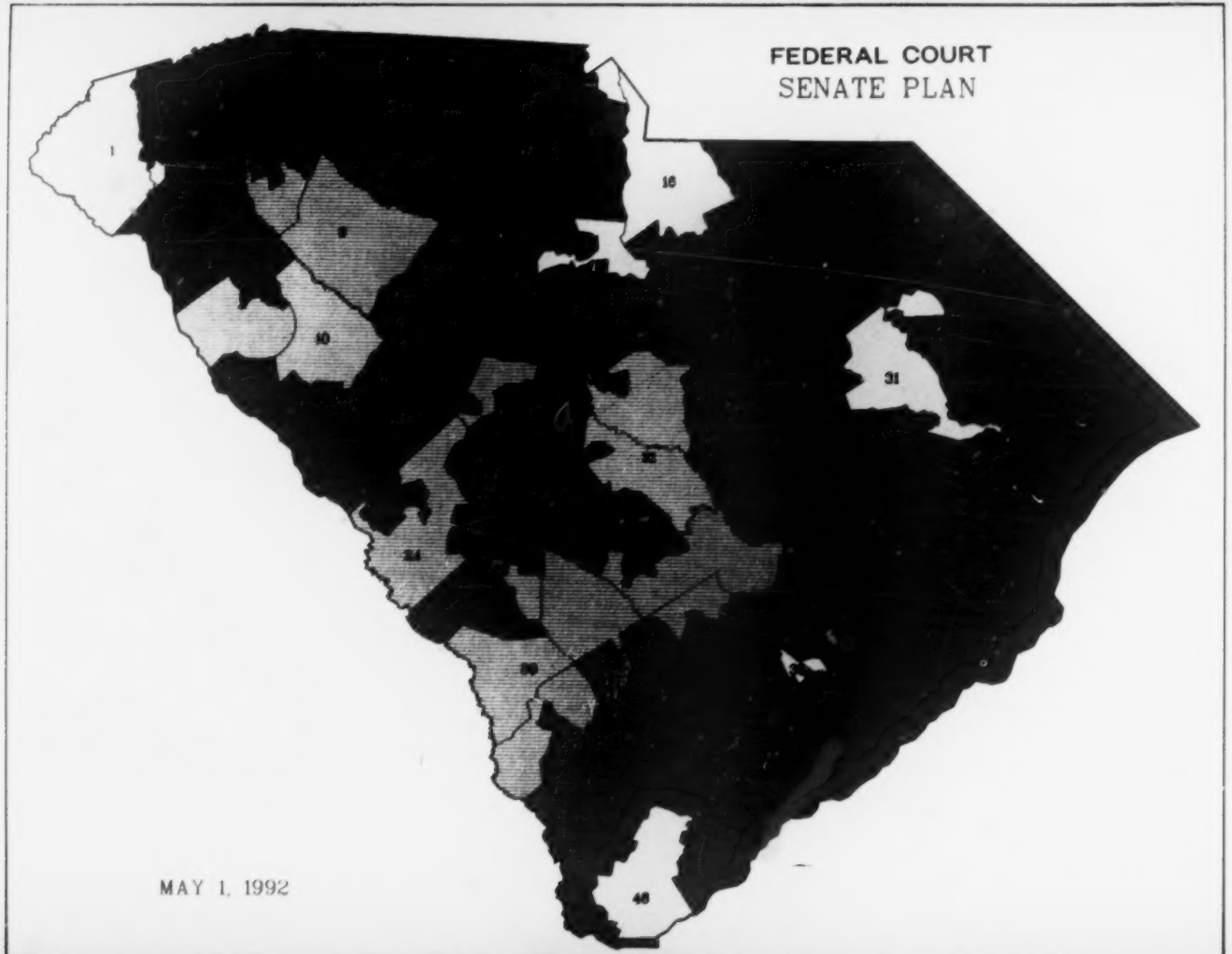
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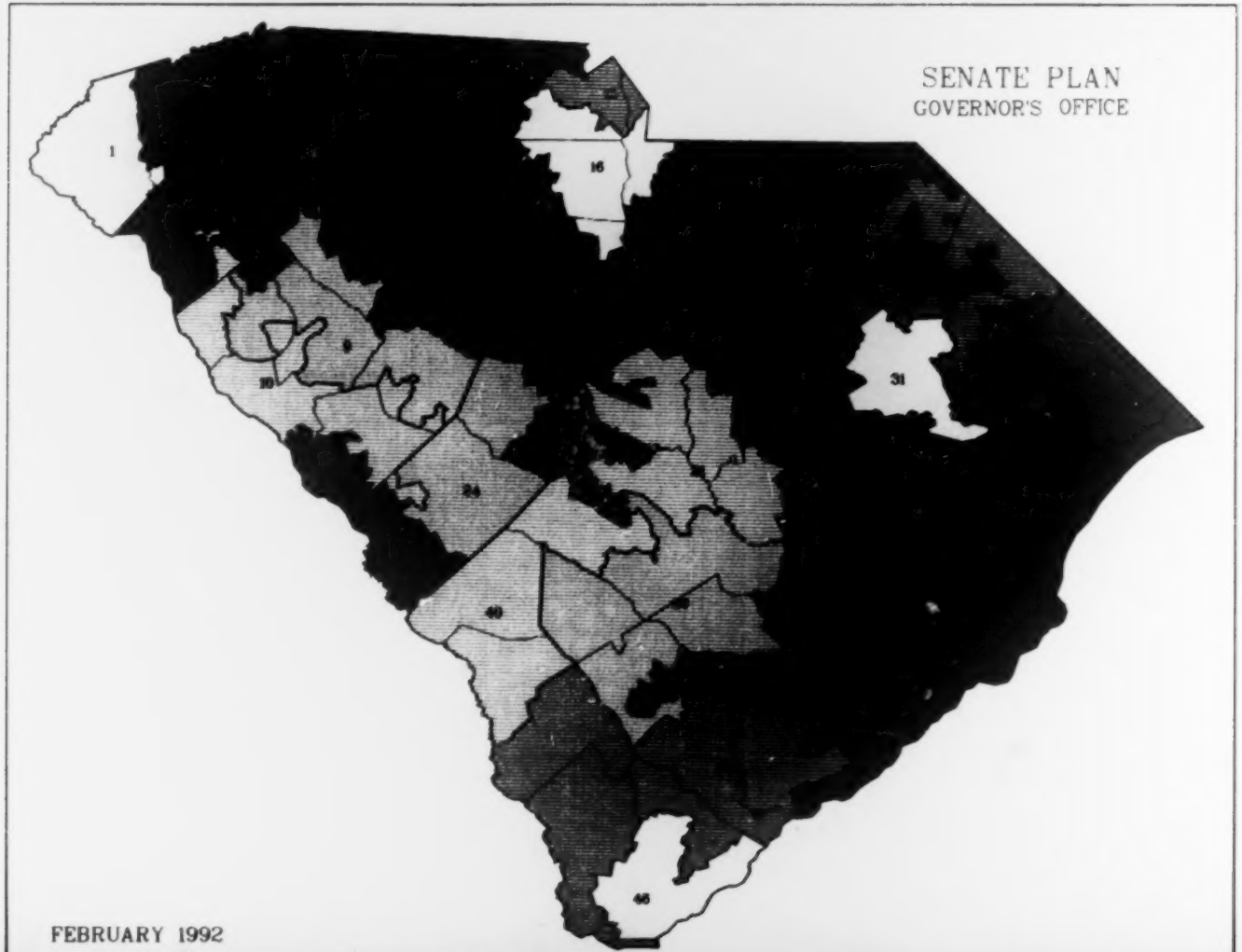
[34] Q. Now, just give me the gross comparison under the various plans that you have analyzed. How many districts are created which provide in your opinion an equal opportunity to the minority community to elect candidates of choice?

A. We believe that our plan has 13 of those districts, that the Senate passed plan has nine, that the Lieutenant Governor's plan has seven, that the Governor's plan has 12, and that the Republican Party's plan has 13.

* * * *


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Nos. 92-155 and 92-219

In The

Supreme Court of the United States

October Term, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Appellants,

v.

NICK THEODORE, et al.,

Appellees.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

v.

NICK THEODORE, et al.,

Appellees.

On Appeal From The United States District Court For The District Of South Carolina

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

LAUGHLIN MCDONALD
Counsel of Record
American Civil Liberties Union Foundation, Inc.
44 Forsyth Street, NW
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

WILLIE ABRAMS
DENNIS COURTLAND HAYES
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, Maryland 21215-3297
(410) 358-8900

JOHN ROY HARPER II
P.O. Box 843
Columbia, South Carolina 29202
(803) 771-4723

Counsel for Appellants

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9 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2571 (1971) 6

I. This Case Is not Moot

The appellees contend in their motions to dismiss or affirm that the court ordered plans in this case are merely "interim" and for that reason should not be reviewed by this Court. They argue that the court ordered plans might become moot in the event the general assembly and governor enact new legislative plans. *See, e.g.*, Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 12.

1. First, while the three judge court expressed its "hope" that the general assembly and the governor would fashion acceptable permanent plans, App. 85, it clearly intended that the court ordered plans would be permanent in the absence of legislative action. According to the three judge court, the court ordered plans

> shall be the lawful election districts for each of those bodies for the general elections scheduled in 1992, and for all subsequent elections until redistricting plans for those bodies are lawfully enacted by the South Carolina General Assembly, signed by the Governor, and approved by the United States Department of Justice pursuant to 42 U.S.C. § 1973c.

App. 86.

Second, there is no assurance that the court ordered plans will not become permanent through inaction of the legislature. Third, given the legislative deadlock in this case, there is no reason to believe the general assembly and the governor could enact legislative plans even if they attempted to do so.

Fourth, experience has shown that in South Carolina once elections are held under a court ordered plan there is little or no incentive for incumbents to replace it with a legislative plan. That is not surprising since incumbents could hardly be expected voluntarily to change the districting system under which they were elected to office. In *South Carolina State Conference of Branches of NAACP v.*

Riley, 533 F.Supp. 1178 (D.S.C. 1982), for example, the three judge court drew an "interim" plan for the 1982 congressional elections. Elections were held under the plan and the general assembly never enacted a replacement. The interim plan became the permanent plan and remained in effect through 1990.[1]

Fifth, under the standard of mootness argued for by the appellees no court ordered plan could ever by challenged – either in the district court or on appeal – for the general assembly and the governor always have it within their power to enact a substitute legislative plan. This Court has never applied such a concept of mootness in election cases and has frequently reviewed "interim" court ordered plans. *See, e.g., Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982), *vacated and remanded sub nom. Winter v. Brooks*, 461 U.S. 921 (1983); *Upham v. Seamon*, 456 U.S. 37 (1982).

2. This Court has held that "[t]he burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), *quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). A case is moot only when it can be said with assurance that "there is no reasonable expectation" that the alleged violation will recur, and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631. Neither condition is satisfied here.

It cannot be said with assurance that there is no reasonable expectation that the court ordered plans will

---

[1] Graham v. South Carolina, Civ. No. 3:84-1430-15 (D.S.C. July 31, 1984), cited by appellees, is not to the contrary. There a three judge court imposed an interim plan for the 1984 state senate elections. Literally within days of the court's decision the general assembly enacted a legislative plan which was precleared by the Attorney General and used in the pending election. The three judge court vacated its interim plan and it never went into effect. Order filed August 13, 1984.

be used in future elections. Indeed, the reasonable expectation is that they will be. In addition, even if the general assembly and the governor were to enact permanent legislative plans, interim use of the court ordered plans would have continuing effects. One of those effects would be the establishment of a discriminatory benchmark, *i.e.*, the court ordered plans themselves, for determining whether the legislative plans were retrogressive under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See, Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (an intervening court ordered plan is the proper benchmark for determining retrogression under Section 5), *appeal dismissed*, 461 U.S. 912 (1983).

3. SRAC's challenge is not limited to a particular election but to the plans adopted by the three judge court. The issues presented in this case, and their effects, will persist as the court ordered plans "are applied in future elections." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). Thus, this case presents a classic example of a controversy that is "capable of repetition, yet evading review," *Rosario v. Rockefeller*, 410 U.S. 752, 765 n.5 (1973), *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972), and is not moot.

4. In the unlikely event that the general assembly and the governor were to enact and preclear new legislative districting, it would be appropriate at that time to consider the issue of mootness. Until then "[t]he normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision." *Tully v. Mobile Oil Corp.*, 455 U.S. 245, 247 (1982).

II. The Issues in this Case Should Be Resolved Now and without Unnecessary Delay

The appellees argue that this appeal should be dismissed or affirmed because SRAC can always file another law suit after the 1992 elections are over. Motion to Dismiss or Affirm of the Democratic Party of South Carolina,

p. 17; Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 14. The argument is directly contrary to the stated intent of Congress that minorities should not bear the burdens of inertia and delay in litigation and that voting rights disputes be disposed of quickly, comprehensively, and finally.

Responding to the "insidious and pervasive evil" of discrimination in voting, Congress enacted the stringent remedial provisions of the Voting Rights Act "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328 (1966). In the legislative history of the 1965 Act, as well as the 1970, 1975 and 1982 extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.' " *NAACP v. New York*, 413 U.S. 345, 354 (1973), *quoting* H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965). *Also see*, 2 S.Rep. No. 417, 97th Cong, 2d Sess. 5 (1982) ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); *Briscoe v. Bell*, 432 U.S. 404, 410 (1977) (the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination *with all possible speed*") (emphasis added).

Given the clear and unambiguous intent of Congress that voting rights disputes be resolved promptly and that the door to minority political participation be opened as quickly as possible, there is no basis for dismissing or affirming this appeal and requiring SRAC to file another law suit after the 1992 elections have been held. Such a course is nothing more than a prescription for the delay, or denial, of equal voting rights and the multiplication of litigation.

The appellees' argument that SRAC can more effectively challenge the court ordered plans after the 1992 elections and that the opinion of the three judge court "did not have res judicata effect" lacks candor. Motion to Dismiss or Affirm of the Democratic Party of South Carolina, pp. 17-8. While SRAC, or anyone else, could file a Section 2 law suit after the 1992 elections the defendants, in the event this appeal were dismissed or affirmed, would surely argue that the Section 2 issues had previously been considered and decided adversely to the plaintiffs by the three judge court here and that further challenge was practically, if not legally, foreclosed. Indeed, that is the very argument that the appellees make *in this case. See, e.g.*, Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 23 ("the district court properly analyzed its plans under Section 2"). The appellees' argument that SRAC would be in a better position to challenge the court ordered redistricting if this appeal were dismissed or affirmed cannot be credited.

III. The Three Judge Court Failed to Make Adequate Section 2 Findings; the Appeal Cannot Be Affirmed

The appellees, as noted *supra*, argue that the three judge court correctly applied Section 2 standards in this case. There are two major flaws in the appellees' argument.

First, the three judge court itself disavowed that it conducted a complete Section 2 analysis. As the opinion unequivocally states, "the court decided against conducting a full § 2 inquiry." App. 44. Second, even assuming the three judge court did what it said it did not do, it made no, or grossly inadequate, Section 2 findings of fact making meaningful judicial review impossible.

The three judge court made no specific findings concerning the extent to which blacks were politically cohesive, the extent and legal significance of racial bloc voting

by whites,[2] nor the extent of minority office holding as provided for by *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986). It also made no specific findings regarding the other factors identified in the legislative history as probative of minority vote dilution, such as the extent of any history of official discrimination, the use of enhancing devices, and the socio-economic status of blacks.[3] In the absence of such findings it is impossible to know the basis of the court's decision, or for this Court to review that decision.

One of the basic purposes of the requirement of Rule 52(a), F.R.Civ.P., that a court sitting without a jury "shall find the facts specially" is to facilitate review by affording the appellate court "a clear understanding of the ground or basis of the decision of the trial court." 9 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2571 at 679 (1971). The rule has special application in voting cases. According to the Fifth Circuit, which had a leading role in developing the jurisprudence Congress incorporated into the 1982 amendment of Section 2, S.Rep. No. 417, *supra*, at 32, "[p]erhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts." *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979). *Accord, Nevett v. Sides*, 533 F.2d 1361, 1365 (5th Cir. 1976) (an appellate court cannot affirm a trial court's determination of vote dilution "without findings of fact to fit proper standards").

---

[2] The three judge court held only that the extent to which voting is racially polarized "remains an open question," and that "the parties' stipulation that since 1984 there is evidence of racially polarized voting in South Caroina is sufficient for our analysis of the plans." App. 56.

[3] Appellee South Carolina Senate admits the failure of the court to treat these factors but argues that it was "unnecessary" to consider them. Motion to Dismiss or Affirm, p. 15.

This Court has similarly required a high degree of specificity in reasoning and fact finding in Section 2 cases. In evaluating a vote dilution claim

> the trial court is to consider the 'totality of the circumstances' and to determine, based "upon a searching practical evaluation of the 'past and present reality,' " . . . whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " . . . and requires and 'intensely local appraisal of the design and impact' of the contested electoral mechanism.

Thornburg v. Gingles, supra, 478 U.S. at 79. If the three judge court conducted such an analysis in this case, something it expressly disavowed, it failed utterly to indicate how it had done so.[4] Consequently, it is impossible for this Court meaningfully to review the decision of the district court for error, and dismissal or affirmance would be inappropriate.

The appellees try themselves to supply the missing Section 2 analysis in this case, but their attempts are unavailing. Appellee Sheheen, for example, says that SRAC "presented Section 2 testimony and evidence to the Court and the Court utilized this information in the drawing of its plans." Motion to Dismiss or Affirm of Robert J. Sheehen, pp. 15-6. SRAC did indeed present Section 2 testimony and evidence, but since the three judge court "decided against conducting a full § 2 inquiry," App. 44, it is impossible to say if, or how, the court utilized the information.

Appellees also analyze the evidence of polarized voting and argue that it was "simply inadequate." Motion to

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[4] Compare, for example, the detailed Section 2 findings of the district court in Gingles v. Edmisten, 590 F.Supp. 345, 357-75 (E.D.N.C. 1984), aff'd sub nom. Thornburg v. Gingles, supra, with the non-findings of the district court in this case.

Dismiss or Affirm of the South Carolina Senate, p. 7. The problem with the appellees' argument is that it is not the analysis of the parties but the analysis of the district court that would be subject to review in this case, an analysis the district court failed to make.

IV. The Issues Are Substantial

It is clear from the appellees' motions to dismiss or affirm that this case presents issues of substantial importance involving the application of Section 2 to court ordered redistricting and that there is a conflict among the decisions of lower courts. One of the central questions presented is whether – in a jurisdiction where voting is racially polarized and blacks lack the equal opportunity to participate in the political process and elect candidates of their choice – a court is obligated to create reasonably compact and contiguous majority black districts where it is possible to do so. SRAC believes the answer, based upon the legislative history of Section 2 and *Thornburg v. Gingles, supra,* is "yes." *See also, Garza v. County of Los Angeles,* 918 F.2d 763, 776 (9th Cir. 1990) ("[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes"). The three judge court and the appellees believe the answer is "no," and that to create majority black districts under the circumstances described above is to apply a "racial ratchet," App. 30-1, or unfairly "maximize" the number of majority black districts. Motion of Appellee Lieutenant Governor Nick Theodore to Dismiss or Affirm, p. 27.

SRAC has never claimed, as the appellees wrongly charge, that it is entitled to some form of proportional representation or to a redistricting plan that provides the greatest possible number of majority black districts. Its contention, rather, is that where there is proof that voting is racially polarized and that blacks lack the equal opportunity to elect candidates of their choice they are entitled

to reasonably compact and contiguous majority black districts where they can be drawn. *See, e.g., Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1004 (1984) (the creation of a majority black congressional district was not based upon "an entitlement to some form of proportional representation" but "on specific findings of fact describing the impairment – or 'dilution' if you will – of the voting strength of the black minority") (concurring opinion of J. Stevens). If, for example, blacks were not politically cohesive, or if whites did not vote as a bloc, or if blacks enjoyed sustained and significant electoral success, a court would have no duty to create *any* majority black districts. *Thornburg v. Gingles, supra*, 478 U.S. at 77.

The extent to which a court in court ordered redistricting is required to conduct a Section 2 analysis and create majority black voting districts are issues which permeate voting rights litigation and over which the lower courts are obviously divided. The resolution of these issues is of the greatest importance to redistricting and minority voting rights.

Conclusion

For these reasons the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LAUGHLIN MCDONALD
American Civil Liberties Union Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

JOHN ROY HARPER II
ID NO. 1729
P. O. Box 843
Columbia, South Carolina 29202
(803) 771-4723

Attorneys for Appellants

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On Appeal From The United States District Court For The District Of South Carolina

---

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
101 W. Friendly Avenue
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Charles E. Carpenter, Jr.
Frederick A. Crawford
Richardson, Plowden,
Grier & Howser, P.A.
1600 Marion Street
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

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Counsel for Appellant Carroll A. Campbell, Jr.
***Counsel of Record**

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(42 U.S.C. § 1973)

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(42 U.S.C. § 1973c)

Other

S. Rep. No. 417, 97th Cong., 2d Sess.
29 (1982) 7

I. Substantial Questions Are Presented.

In each separate Motion to Dismiss or Affirm filed in this case, the Appellees have underscored the substantial nature of the questions presented. Both the Appellants and the Appellees agree on the fundamental principles of law established by this Court which must guide a district court in fashioning its own legislative redistricting plans: none of the parties have questioned or challenged this Court's recognition that a lower federal court must meet "higher standards" in drafting redistricting plans than a legislative body. Chapman v. Meier, 420 U.S. 1, 26 (1975), and that, when devising and imposing a remedy, the lower court must "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." Connor v. Finch, 431 U.S. 407, 425 (1977).[1] In addition, the Appellees have specifically recognized the duty of a

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[1] This admonition in Connor is intended to prompt a district court into settling all of the potential legal issues when it imposes its remedy, rather than engendering subsequent related cases which attack the original remedy. Connor is part of a consistent line of cases promulgated by this Court emphasizing the stricter standards for federal courts when redistricting a state, instead of the much less rigorous standards used to judge legislatively enacted plans. Roman v. Sincock, 377 U.S. 695, 710 (1964) (Court-ordered plans should be "free from any taint or arbitrariness or discrimination."); Connor v. Johnson, 402 U.S. 690, 692 (1971) ("[W]hen district courts are forced to fashion apportionment plans, single member districts are preferable . . .") Connor v. Williams, 404 U.S. 549, 550 (1972) (confirming the holding in Connor v. Johnson.) Chapman v. Meier, 420 U.S. 1, 26 (1975) ("A court-ordered plan must be held to a higher standard than at State's own plan.") Connor v. Finch applies these higher standards to minority vote dilution as well as the one person, one vote principle. 431 U.S. 407, 421-26 (1977).

federal district court to insure racial fairness in drawing a redistricting plan. See Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 18 ("The district court also should strive for racial fairness: the court-ordered plan must not be racially discriminatory in purpose or effect . . ."); Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 6 ("Section 2 of the Voting Rights Act prohibits the implementation of a redistricting plan that results in the dilution of minority voting strength.").

As to the facts, the parties agree that the court below was presented with alternative redistricting plans. Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 6; Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 22-23; Motion to Dismiss or Affirm of the South Carolina Senate at 11; Motion to Dismiss or Affirm of the Democratic Party of South Carolina at 7. For example, in contrast to the court's plan, one of the alternative Senate plans provided three more districts in which minority voters would have constituted a majority of the total population.[2] Similarly, one of the alternative State House plans created eight more minority districts than the court's plan.[3]

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[2] Governor Campbell and the Republican Party submitted separate Senate plans which provided for 13 and 14 districts, respectively, which had a majority black population; the court's plan contained only 11 such districts. See SRAC Jurisdictional Statement at 12. Even at this reduced number of districts, some of the court's districts will not result in the election of the candidates of choice of minority voters. See p. 8, infra.

[3] The alternative House plans submitted by the Governor and the Republican Party contained 35 and 36 districts respectively which had a majority black population; the court's plan contained

Finally, there is agreement among the parties that, in crafting its remedy, a district court must engage in a Section 2 remedial analysis. Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 22-23; Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 11; Motion to Dismiss or Affirm of the South Carolina Senate at 14; Motion to Dismiss or Affirm of the Democratic Party of South Carolina at 18. In this regard, the parties differ only as to the standard necessary to achieve racial fairness.

Despite these areas of agreement, the Appellees uniformly claim that no substantial question is now presented and that the court below applied the proper standards for court-drawn plans. The Appellees, however, seek support for this position by relying upon cases involving the less rigorous standards applied to legislatively drawn plans, not the higher standards required of federal courts.

The higher standards have been imposed on the district courts not only to prevent federal constitutional and statutory defects, but also in order to protect the judiciary's legitimacy by eliminating the possibility of reasonable charges of discriminatory or political arbitrariness. This Court has recently recognized the importance of protecting judicial credibility and legitimacy from such charges:

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands . . . The Court must take

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only 28 such districts. See SRAC Jurisdictional Statement at 15.

> care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2814 (1992). See also Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J. dissenting). Thus, these higher standards are intended to protect courts from the appearance of politicization when venturing into the "political thicket."

The higher standards for the court-ordered plans require a district court to gather and analyze evidence under Section 2 of the Voting Rights Act. See Brooks v. Winter, 461 U.S. 921 (1983). This is a prudent and logical way to "allay suspicions" and prevent new constitutional challenges. Connor, 431 U.S. at 425. By substituting its own standards, the court below failed to meet the necessary requirements for court drawn plans. This failure raises substantial questions for review.

II. The District Court Should Comply Fully With The Requirements Of Section 2 Of The Voting Rights Act.

As discussed in the Motion of Appellee State Senate, the court below neither rejected the applicability of Section 2 nor did it provide a complete Section 2 analysis. Motion to Dismiss or Affirm of the South Carolina Senate at 17. Such a position, lacking a structured approach to Section 2, invites careful examination of the relationship between Section 2 and court drawn plans.

In the present case, despite requests to the contrary, the court below failed to grant relief to cohesive minority communities. This error, if uncorrected, may be repeated by other lower courts, thus frustrating the intent of Congress to eliminate racial discrimination in voting.

Sufficient evidence of racial bloc voting was before the court below to conduct Section 2 remedial hearings. That the evidence was questioned does not mean that it was rebutted by direct evidence from the Appellees. It is now clear that questions concerning the proper tests and standards which should be used by a court in drafting a redistricting plan are subject to recurrence, as a brief historical review of South Carolina's redistricting process will reveal. See Graham v. State of South Carolina, Civil Action No. 3:84-1430-15 (D.S.C., July 31, 1984); South Carolina State Conf. of Branches of the NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982), aff'd, 459 U.S. 1025 (1982).

Contrary to appellees' assertions, the Appellant does not seek "maximization" of minority districts.[4] The Appellant does seek fairly drawn legislative plans in which compact, cohesive minority communities have the opportunity to elect candidates of choice in accordance with the requirements of the Voting Rights Act.

The Appellees, in their Motions to Affirm or Dismiss, cite a number of cases for the proposition that the Voting Rights Act requires far less than the maximization

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[4] In fact, the remedial plans proffered by Governor Campbell at trial provided for fewer minority districts than some of the other proposals presented. See SRAC Jurisdictional Statement at 12, 15.

of minority voting strength; however, the cases principally relied upon by appellees concern what are permissible legislative plans, not court-ordered plans which are subject to far stricter standards.

In McDaniel v. Sanchez, 452 U.S. 130 (1981), this Court noted the distinction between legislative and court ordered plans. Legislative plans are those which express the policy choices of the state. Id. at 152. See also Wise v. Lipscomb, 437 U.S. 535 (1978); Burns v. Richardson, 384 U.S. 73 (1966). As such, they are subject to preclearance under Section 5 of the Voting Rights Act, even if drawn in response to a court order. Court drawn plans, on the other hand, are not subject to preclearance, but are subject to higher standards to protect the court's credibility, as explained above. Connor v. Johnson, 402 U.S. 690 (1971); Connor v. Finch, 431 U.S. 407 (1977).

III. The District Court Must Provide Legislative Plans Which Do Not Fragment Minority Communities Of Interest.

The issue remains as to whether a court meets its burden of racial fairness if a court drawn plan does not fully and completely eviscerate racial dilution in voting wherever it exists. It is self-evident that there are several geographically compact areas of the state in which the court failed to include in its remedy. See Governor Campbell's Jurisdictional Statement at App. 22-43. Where such failures exist, a plan cannot be deemed racially fair under Connor v. Finch, despite the court's reservation of the right of the parties to lodge a Section 2 challenge in the future.

Contrary to the assertions of the Appellees and the district court, the redistricting scheme produced by the district court not only failed to "allay suspicions," it unnecessarily created them. The court below erred by raising policies of incumbent protection[5] and county line integrity[6] to the level of the protections of the Voting Rights Act.

The Appellees allege that the court drew as many effective minority districts as could be drawn. This contention is simply insupportable in light of the alternative plans submitted by the parties. The districts drawn in the court-ordered redistricting scheme consistently minimize the size of the minority community in order to protest white incumbents. As a result, the court actually reduced

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[5] Incumbent protection is a tenuous state policy which is not embodied in any state statute or the constitution. The court below, despite its disclaimer, continued this policy by preserving core areas of prior districts and avoiding the pairing of incumbents. See SRAC Appendix 64-65. Courts have found that protection of incumbents may be an excuse for the perpetuation of discriminatory plans. See Garza v. Los Angeles County, 918 F.2d 763 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 681 (1991).

[6] In one person, one vote cases, this Court has recognized preservation of county lines as a legitimate state interest if consistently applied. Mahan v. Howell, 410 U.S. 315 (1973). Such a state interest is not paramount, however. As indicated in the legislative history accompanying the 1982 amendments to Section 2, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.117 (1982).

the ability of the minority community to elect candidates of their choice in the 21st and 40th Senate districts. [7] Can it be coincidental that the current white incumbents in these seats which the district court describes as minority seats are the Majority Leader and the President Pro Tempore of the Senate? The plans offered by the plaintiffs and the Governor demonstrate that this retrogression was unnecessary, because those plans created additional districts in which minorities would have an opportunity to elect candidates of their choice.[8]

This Court recently requested the opinion of the Solicitor General of the United States in the pending case of Figures v. Hunt, 91-1992, (October 6, 1992, order). Both Figures and the present case involve the delicate

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[7] In another court ordered district (Senate District 17 which contains 51.62% black voting age population), the candidate of choice of the minority community was defeated in the recent primary election.

[8] The lower court claims to have drawn 11 minority Senate seats; however, the court consistently failed to include adjacent minority communities in its minority districts. Four of the areas encompassed by new districts (21, 40, 36 and 32) have consistently failed to elect a candidate of the minority community's choice. In reality, the district court has only drawn seven districts where the minority community can elect a candidate of choice, not the 11 claimed by the court and the appellees. This is only one more than the current number of districts capable of electing a candidate of the minority community's choice. (The Senate claims its 1984 scheme had 10 districts capable of electing a candidate of the minority community's choice but, in fact, only six are actually capable of electing a candidate of the minority community's choice because they also fragment the minority community in the same four districts.)

situation created when a state avoids Section 5 preclearance by having a court impose a remedial plan.

In fact, the redistricting scheme involved in the case at bar is more egregious than the plan in Figures and is factually distinguishable from Figures on that basis. Moreover, the parties in Figures stipulated the 1990 census and the circumstances in Alabama required the creation of one minority district of 65 percent minority population or more. Late in the trial, the appellees in Figures submitted a two-minority district plan with 59.33 percent and 61.98 percent in minority population. The trial court honored the stipulation and ordered a single district plan with a district of 65 percent.

In South Carolina, no such stipulation was made. The plaintiffs provided ample evidence that minority voting strength was being diluted by fragmenting minority communities of interest in an effort to protect white incumbents. In this effort, the district court went so far as to retrogress unnecessarily two Senate districts which have almost enough black voting strength to elect candidates of the minority community's choice; the court's configuration has the effect of protecting key white incumbents.

IV. The Issues Presented Are Not Moot.

The issues presented in this case are not mooted by the passage of time nor are they made less substantial because of its nature as a remedial order. As was evident during the trial of this case, the use of highly sophisticated, computer-generated district maps also produces illustrative data to demonstrate the outcome of past races in proposed districts. The ability to consider this type of data is particularly useful in determining the potential impact of

racial bloc voting on proposed districts. The claim that minority groups cannot challenge a discriminatory electoral system because no election has been conducted is both logically fallacious and legally insupportable. In fact, in every remedial proceeding, courts must evaluate the legal sufficiency of proposed plans before a court-ordered plan is tested in an election. See SRAC Brief Opposing Motions to Dismiss or Affirm at 1-5.

V. Conclusion.

Based on the foregoing, the Court should note probable jurisdiction.

Respectfully submitted,

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
101 W. Friendly Avenue
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Charles E. Carpenter, Jr.
Frederick A. Crawford
Richardson, Plowden, Grier & Howser, P.A.
1600 Marion Street
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

Counsel for Appellant Carroll A. Campbell, Jr.

FILING AND MAILING CERTIFICATE

I hereby certify that on this 3rd day of November, 1992, I filed 40 copies of a Brief Opposing Motions to Dismiss or Affirm with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Barbara E. Drone

Lawyers Printing Company
Suite B-115
7th & Franklin Building
Richmond, Virginia 23219

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Nos. 92-155 and 92-219

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, ET AL., APPELLANTS

v.

NICK THEODORE, ET AL.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA, APPELLANT

v.

NICK THEODORE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
REBECCA K. TROTH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court gave adequate consideration to the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, in imposing redistricting plans for use in congressional and state legislative elections in South Carolina.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. South Carolina's General Assembly consists of a Senate and a House of Representatives. Statewide Reapportionment Advisory Committee, et al. (SRAC) J.S. App. 4; S.C. Const. Art. III, § 1. The 46 members of the Senate and the 124 members of the House are elected from single-member districts. SRAC J.S. App. 4; S.C.

Const. Art. III, §§ 3, 6. In addition, South Carolina is entitled to six Representatives in the United States House of Representatives. SRAC J.S. App. 5.

The 1990 census revealed that South Carolina's legislative and congressional districts were malapportioned. See, *e.g.*, SRAC J.S. App. 6 & n.13. The South Carolina General Assembly considered new districting plans to cure the malapportionment, but was unable to agree on such plans before the adjournment of the 1991 legislative session. *Id.* at 6-7.

2. In October 1991, Michael Burton, the Executive Director of the South Carolina Republican Party, and other South Carolina voters (the Burton plaintiffs) sued various state officials, alleging that South Carolina's then-existing election districts violated the one-person, one-vote requirement of the United States Constitution. App., *infra*, 2a, 5a-8a (Burton complaint). See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964) (state legislative districts); *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964) (congressional districts). The complaint also alleged violations of the prohibition in Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, against vote dilution on account of race.[1] App., *infra*, 2a, 8a-10a. Finally, the Burton plaintiffs alleged that the General Assembly would not be able to pass redistricting plans and have them precleared in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, in time to hold the 1992 primary elections. App., *infra*, 5a-7a. The complaint sought an injunction against the State's use of the existing election districts and asked the court to adopt new plans for the 1992 elections. *Id.* at 11a-12a.

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[1] Section 2 prohibits practices that deny or abridge voting rights on account of race; in particular, it prohibits political processes that afford members of a protected class "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice." 42 U.S.C. 1973(b).

A three-judge district court was convened pursuant to 28 U.S.C. 2284(a).

A separate group of plaintiffs, including the Statewide Reapportionment Advisory Committee (an unincorporated private association), the South Carolina NAACP, and several individual black voters, filed a similar lawsuit alleging that the existing election districts violated both the U.S. Constitution and Section 2 of the Voting Rights Act. App., *infra*, 13a-24a. The court consolidated the SRAC and Burton lawsuits, and it permitted the South Carolina Senate, the Democratic Party of South Carolina, and various others to intervene as defendants. SRAC J.S. App. 8-9.

The General Assembly reconvened in January 1992. It adopted redistricting plans for the state Senate and House, but did not agree on a congressional redistricting plan. SRAC J.S. App. 10-11. Cross-appellant Governor Campbell, a defendant below, vetoed both state redistricting plans on the ground that they failed to create sufficient numbers of effective minority districts and thereby violated the Voting Rights Act. Campbell J.S. App. 8-21. Both vetoes were sustained. SRAC J.S. App. 11.

After the vetoes, the district court decided that judicial intervention was unavoidable. SRAC J.S. App. 14. Because all parties stipulated that the State's existing electoral districts were unconstitutionally apportioned under one-person, one-vote principles, the court found it unnecessary to consider whether they also violated Section 2 of the Voting Rights Act. *Id.* at 3 n.2. The three-week trial focused instead on the parties' various redistricting proposals and the development of an appropriate judicial remedy. *Id.* at 11-12. In that context, however, the plaintiffs presented considerable evidence relevant to the question whether particular proposed plans or districts complied with the mandates of Section 2. That evidence included expert testimony on the extent of racially polarized voting in South Carolina, see *id.* at 56

n.49, as well as other evidence relating to the factors enumerated by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). In addition, the parties stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC J.S. App. 56.

3. On May 1, 1992, the district court announced that it was not adopting any of the redistricting plans proposed by the parties, but rather had drawn its own plans. SRAC J.S. App. 12. The court directed that its plans were to be used for the 1992 elections and for all subsequent elections until the State enacted. plans that were approved under Section 5 of the Voting Rights Act. *Id.* at 86.

Although both the Burton plaintiffs and the SRAC plaintiffs challenged South Carolina's existing electoral districts under Section 2 of the Voting Rights Act (as well as under the Constitution), App., *infra*, 8a, 13a, neither asserted a cause of action under Section 5 of the Voting Rights Act. The district court nevertheless began its analysis by stating that the proceedings "ar[ose] under" Section 5, SRAC J.S. App. 13, and by setting out three principles that it considered applicable to a Section 5 analysis.

First, the court concluded that, to the extent consistent with federal law, it should honor the State's own "policies and preferences." SRAC J.S. App. 14 (quoting *White* v. *Weiser*, 412 U.S. 783, 795 (1973)). Based on the South Carolina Constitution and the history of the State's past redistricting efforts, the court identified a "preeminent" state policy of "maintaining the integrity of county boundaries in the redistricting process." SRAC J.S. App. 15-16. Second, the court concluded that it was bound by "stringent equal population requirements" in imposing a congressional redistricting plan, *id.* at 17, but that its plans for the state legislature might reflect "de minimis" variations in district populations. *Id.* at 24. Third, the court held that its plans must not be "retrogressive"—

that is, there must be no "diminution in minority opportunity from what it had been under an earlier plan." *Id.* at 25-26 (citing *Beer* v. *United States*, 425 U.S. 130, 141 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983)).

While thus viewing this case as "a § 5 proceeding," the district court recognized that "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2." SRAC J.S. App. 38. The court held, however, that "complete adoption" of Section 2 standards was "unwarranted," for three reasons. *Id.* at 38-39. First, the court cited "fundamental differences" between Section 2 and Section 5, see *id.* at 39-42, noting in particular that a typical Section 2 plaintiff is "attacking an existing practice," whereas in these proceedings, the court was "operating more in the nature of a forum" and considering five or more proposed districting plans for each of three legislative bodies. *Id.* at 41 (emphasis omitted). Second, the court stated that it did not have time to conduct the "strenuous" fact-finding that would be required for a full Section 2 challenge to each of the proposed plans before adopting plans for use in the 1992 elections. *Id.* at 43-44. Finally, the court found a "lack of legislative or judicial guidance" requiring "a blanket rule that § 2 guidelines should be infused into § 5." *Id.* at 44.

For these reasons, although the court rehearsed all of the factors relevant to finding a violation of Section 2 identified by this Court in *Gingles*, see SRAC J.S. App. 33-38, it ultimately chose to evaluate various plans only against the three threshold factors for Section 2 liability identified in *Gingles*,[2] as well as several additional factors identified by the court itself (SRAC J.S. App. 46):

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[2] "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * *

> 1) the extent to which the plans * * * are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart* [3]; 2) the extent to which reasonable compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; [and] 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina.

In applying those factors, the district court stated that its analysis "should ensure that the [*Gingles*] threshold requirements of a § 2 action cannot be established under the adopted plan[s]." SRAC J.S. App. 45. The court did not, however, determine "the extent to which voting is polarized in South Carolina" generally or in particular proposed districts; instead, the court concluded that the degree of racially polarized voting "remains an open question and will certainly vary from locality to locality." *Id.* at 56. In determining that it had created a sufficient number of "black opportunity districts"—*i.e.*, districts in which black citizens could be presumed to have the ability to elect the candidate of their choice—the court defined such a district as one with a black voting-age population "greater than 50 percent," *id.* at 48, and gave considerable weight to the goal of preserving county and precinct lines. It did not address the plaintiffs' arguments that because of specific conditions in South Carolina or in particular proposed districts, a black voting-age popula-

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Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

[3] See *Beer* v. *United States*, 425 U.S. 130, 141 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), applying the non-retrogression principle in Section 5 cases.

tion of 57% or more was needed for black voters to have a realistic opportunity to elect their chosen candidates. See, *e.g.*, *id.* at 25-26. Nor did the court specifically consider whether the dictates of Section 2 should override any contrary state policy in drawing particular districts.

4. a. Applying these principles to South Carolina's Senate districts, the court devised a plan that provided for ten districts (21.7% of the total of 46 districts) in which blacks constituted more than 50% of the voting-age population.[4] SRAC J.S. App. 67. Because, using 1990 census figures, blacks constituted more than 50% of the voting age population in only nine of the existing districts, the court concluded that its plan was not retrogressive in violation of Section 5. *Id.* at 67. Blacks made up less than 65% of the voting age population in each of the Senate districts under the court's plan, and less than 55% in five out of the ten. *Id.* at 68. The plans proposed by the Governor and the Burton plaintiffs had smaller total population deviations and more majority black districts, but the court rejected both plans because, in its view, they crossed too many precinct and county lines. SRAC J.S. 12; SRAC J.S. App. 61-65. The court also criticized those plans for creating districts in which the "only cognizable community of interest * * * is the black race," *id* at 64, and for reflecting "apparent partisan considerations" by pitting Democratic incumbents against one another. *Id.* at 65.

b. The court's plan for the state House districts resulted in 23 out of 124 districts (18.5%) in which blacks constituted more than 50% of the voting-age population. SRAC J.S. App. 72. The court found that its plan was not retrogressive because the existing plan, using 1990 census figures, contained only 21 such districts. *Ibid.* The court noted that four of the plans submitted by the parties also resulted in de minimis population

[4] According to the 1990 census, South Carolina's voting-age population is 26.9% black. See SRAC J.S. App. 88.

variations and created more black majority districts.[5] *Id.* at 73. But the court rejected those plans because, in its view, all of them called for "excess" cuts in county lines and three of the four unduly pitted incumbents against one another. *Id.* at 73-75.

At the same time, the court concluded that its plan for the House of Representatives "contain[ed] no obvious violations of § 2," because it recognized "those concentrations of black population in the state that are sufficiently large and geographically compact to form a majority in a single member district." SRAC J.S. App. 76. The court rejected the parties' plans calling for more majority black districts as attempts to "achieve proportional representation on the basis of race," without proper deference to "traditional state political units such as the county." *Id.* at 76-77. It also criticized some of the parties' proposed districts because of their "bizarre" shapes and because they lacked "any distinct communities of interest, apart from race, which would demonstrate district cohesiveness." *Id.* at 79. The court concluded that its plan, with fewer majority black districts, struck "the proper balance between the various interests arising in this type of proceeding, including equality of population in districts, racial fairness, and maintenance of the state's political subdivisions and communities of interest." *Ibid.*

c. The court's congressional districting plan achieved population equality. SRAC J.S. App. 80-81. Because all of the parties proposed plans having one majority black district, the court likewise drew one such district (out of six), with a 57.9% black voting-age population. The court did not decide whether such a district was legally required. *Id.* at 82-83. The court determined that its plan was not retrogressive for purposes of Section 5 because the then-existing plan had no black

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[5] The Republican plan created 36 majority black districts, the Governor's plan 35, and SRAC's plan 32. SRAC J.S. App. 76, 78.

majority district. *Id.* at 82. The court drew a congressional district encompassing the "general concentration of black population," preferring its plan to others that split fewer counties because the others showed a higher population deviation. *Id.* at 83-84.

DISCUSSION

The district court misunderstood the nature of the action before it. That error led the court to give inadequate consideration to, and to make inadequate findings concerning, allegations and evidence of violations of Section 2 of the Voting Rights Act. We take no position at this time as to whether the redistricting plans adopted by the court would in fact violate Section 2 if applied to elections held subsequent to 1992. Because we believe that review by this Court would be premature on the present record, we suggest that the Court remand the case and direct the district court to consider in detail (and to make appropriate findings and conclusions with respect to) objections raised by any party on the ground that the court's plans do not comply fully with the requirements of Section 2.

1. The district court erred in viewing this litigation as arising under Section 5 of the Voting Rights Act. Section 5 requires that changes in election practices proposed by a covered jurisdiction be "precleared," either through submission to the Attorney General or through a declaratory judgment action filed by the jurisdiction in the United States District Court for the District of Columbia. 42 U.S.C. 1973c. See generally *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 558-560 (1969). This litigation, by contrast, involved challenges brought by private plaintiffs against the responsible authorities of a covered jurisdiction, alleging that its existing election districts violated both Section 2 of the Voting Rights Act and the United States Constitution.

To be sure, because all parties to the litigation conceded the invalidity of the then-existing districting plans

under one-person, one-vote principles, the district court was not required to consider Section 2 challenges to specific existing electoral districts. The court instead properly focused on the nature of the new plans that should be put in place. In that setting, it was appropriate for the court to consider Section 5's general principle that electoral changes may not have the purpose or effect of denying or abridging voting rights on account of race. See SRAC J.S. App. 25; *McDaniel* v. *Sanchez*, 452 U.S. 130, 148-149 (1981). Nevertheless, the court's primary task was to fashion a remedy that would not itself violate the legal standards that the plaintiffs had sued to enforce. Contrary to the court's view, discharging that task required the court to ensure that the plans it adopted complied in all respects with the requirements of Section 2.

Two of the three reasons given by the district court for failing to undertake a complete Section 2 analysis stem directly from its misconception of the proceeding as one arising under Section 5. For example, any perceived differences between Section 5 and Section 2 litigation, see SRAC J.S. App. 39-42, are irrelevant to the question of what standards should be applied in fashioning an appropriate remedy in a case in which Section 5 is not even directly at issue, Section 2 violations have been alleged, and liability is conceded on constitutional grounds.[6] Likewise, the "lack of a clear legislative intent

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[6] Similarly, the district court's concerns about rendering an "advisory" opinion or "impair[ing] the duality of remedies currently afforded aggrieved parties under principles of *res judicata* or separation of powers," SRAC J.S. App. 42, can hardly be avoided by labeling as a Section 5 proceeding a suit that was clearly brought under Section 2 and the Constitution. It seems clear in this case that any such concerns could best be avoided by resolving all of the parties' claims under Section 2 with respect to the districting plans imposed by the court. The controversy is live and properly before the court; one definitive judgment and one remedy are necessary, and should suffice.

or judicial interpretation that the results test of § 2 should be completely imported into § 5," SRAC J.S. App. 39, is not a relevant concern in a case arising under Section 2 and the Constitution.

The court's final reason for refusing to undertake a full Section 2 inquiry—the imminence of the 1992 elections—was relevant only insofar as those elections were concerned. Although a court should always strive to ensure that any plan it imposes complies with Section 2, it has reasonable latitude in devising an interim remedy when it is confronted with tight time constraints. *Mahan* v. *Howell*, 410 U.S. 315, 332-333 (1973); *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982); *Reynolds* v. *Sims*, 377 U.S. at 585-587. The same time constraints do not apply, however, with respect to districts imposed for use in subsequent elections. Given the legislative deadlock after the 1990 census that necessitated the court's intervention in this case in the first place, see generally SRAC J.S. App. 5-12, the court's so-called "interim" plans, *id.* at 85-86, may well remain in place for the next ten years. To the extent that they do, the district court is obligated to subject them to a full Section 2 analysis.[7]

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[7] Appellee Theodore, the Lieutenant Governor of South Carolina, argues that these cases should be dismissed as moot because the 1992 elections have been held and the General Assembly may enact redistricting plans applicable to future elections. Theodore Mot. to Dismiss or Affirm 12-14. The district court's order applies, however, to all subsequent South Carolina elections unless and until the General Assembly enacts alternative plans that are successfully cleared under Section 5. SRAC J.S. App. 86. None of the cases appellee cites involved an order explicitly applicable to future elections. In *Watkins* v. *Mabus*, 112 S. Ct. 412, aff'g in part and vacating in part 771 F. Supp. 789 (S.D. Miss. 1991), for example, the district court's order provided an interim remedy and a procedure for devising plans for subsequent elections; only the interim remedy aspect of the case was found moot. 112 S. Ct. at 412. Appellee admits that the court-ordered congressional redistricting plan imposed after the 1980 census remained in effect for eight years. Theodore Mot. to Dismiss or Affirm 3 n.2. In any event, we suggest

2. The district court purported to apply the three fundamental requirements identified in *Gingles*—size and compactness of minority concentrations, minority political cohesiveness, and majority bloc voting [8]—so as to "insur[e] that the court's plan [would] not violate the threshold requirements for liability under § 2." SRAC J.S. App. 45-47. Properly applied, that approach might be an appropriate way for a court to avoid an unnecessarily extensive Section 2 inquiry. If, for example, the court had found that voting in South Carolina elections was not racially polarized, any Section 2 claim would have been destined to failure under *Gingles*, and there would have been little point in taking other evidence or making other findings relevant to such a claim.[9] In fact, however, the court made no such dispositive finding with respect to any of the *Gingles* threshold requirements.

a. The parties agree that the court had before it substantial evidence relevant to the factors identified in *Gingles* as probative of minority vote dilution in viola-

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remand of the case to the district court for precisely the sort of "concrete, district-by-district" review of the court's plans under Section 2 that appellee acknowledges (*id.* at 13) would be appropriate if the plans are to be utilized in future elections, using not only the current record but, if helpful, "evidence derived from the 1992 election regarding racial polarization, political cohesiveness and other Section 2 factors." *Id.* at 13-14. Should predictions of state legislative action be fulfilled while that review is in progress, the district court could terminate its review of the court-ordered plans as moot at that time. See, *e.g.*, SRAC J.S. App. 85-86.

[8] The term "polarization" tends to subsume the technically separate *Gingles* inquiries into minority cohesiveness and majority bloc voting. See, *e.g.*, *Gingles*, 478 U.S. at 56. Like the district court, we treat the two questions together. See SRAC J.S. App. 55.

[9] We agree with the court below that the three "necessary preconditions" identified in *Gingles*, 478 U.S. at 50-51, are "threshold requirements" for imposing a Section 2 remedy. See SRAC J.S. App. 36 & n.37. This is true in the context of both single-member and multi-member districts. See *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1157 (1993).

tion of Section 2. See Theodore Mot. to Dismiss or Affirm 26; SRAC J.S. 5-8; Sheheen Mot. to Dismiss or Affirm 14-15; Senate Mot. to Dismiss or Affirm 7-8. That evidence included expert testimony on the history of discrimination in South Carolina and expert statistical testimony on the extent of racially polarized voting. The parties also stipulated that there was racially polarized voting in South Carolina, but they disagreed on the extent and the effect of the polarization. See SRAC J.S. App. 56; Theodore Mot. to Dismiss or Affirm 26, 28-30; Senate Mot. to Dismiss or Affirm 7-8.

Presented with this evidence, and despite its declared intention to preclude establishment of the *Gingles* threshold factors with respect to its plans, the district court explicitly refused to resolve the issue of polarized voting. The court stated that "the extent to which voting is polarized in South Carolina remains an open question and will certainly vary from locality to locality," and it accepted as "sufficient for [its] analysis" the parties' general stipulation that there is evidence of racially polarized voting in South Carolina. SRAC J.S. App. 56. Although we agree with the Senate appellees that evidence of racial polarization or other factors would have to be more localized and specific to support creating or rejecting a challenged electoral district on Section 2 grounds, see Senate Mot. to Dismiss or Affirm 7-8 & n.8, the district court neither made specific findings rejecting the evidence of polarization in particular districts nor found as a general matter that polarization was not present. The court simply failed to address all relevant aspects of that crucial question, which goes to the heart of whether the plans it imposed comply with Section 2.

b. Similarly, the district court did not respond adequately to the question whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas to avoid dilution of black voting strength in violation of Section 2. To be

sure, the court touched on those issues in discussing its plans. See SRAC J.S. App. 63-64 (discussing lack of "community of interest" in Senate District 10 proposed by Governor and state Republican Party); *id.* at 75-79 (concluding that court's House plan strikes appropriate balance between minority representation and other factors for purposes of Section 2, "given the nature of this proceeding"); *id.* at 82-85 (discussing Section 2 concerns and the creation of a majority-black congressional district). But the court's treatment of those issues was both legally flawed and insufficiently detailed to provide an adequate basis for appellate review.

i. Because the court did not determine the extent of racial bloc voting or consider the existence of historic barriers to minority participation in the electoral process in South Carolina, there was no basis for the court's finding that any district in which blacks constitute more than 50% of the voting age population may be considered a "black opportunity district." SRAC J.S. App. 48. Whether black voters have a realistic opportunity to elect their chosen candidates in any given district is a function of the circumstances prevailing in that district. *E.g., Jeffers* v. *Clinton,* 730 F. Supp. 196, 204-217 (E.D. Ark. 1989) (three-judge court), aff'd mem., 111 S. Ct. 662 (1991). Where access to the political process is limited by present discrimination or the present effects of past discrimination, a bare majority of the voting age population may not afford blacks a realistic opportunity to elect representatives of their choice. See, *e.g., Jeffers* v. *Clinton,* 756 F. Supp. 1195, 1198-1199 (E.D. Ark. 1990) (three-judge court); *Ketchum* v. *Byrne,* 740 F.2d 1398, 1410-1416 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Zimmer* v. *McKeithen,* 485 F.2d 1297, 1302-1304 (5th Cir. 1973), aff'd per curiam *sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U.S. 636 (1976).

Based on evidence of polarization and historic patterns of voter registration and turnout in South Carolina, the plaintiffs in this case argued that a district should have a black voting-age population of at least 57% in order for black voters to have a realistic chance of electing their preferred candidates. SRAC J.S. 8; Campbell J.S. 21. The district court did not address that argument or justify its 50% figure in light of the "totality of the circumstances" in South Carolina or in any particular electoral district.[10] See SRAC J.S. App. 48. We think it was incumbent on the district court to resolve specific challenges to particular districts on the ground that they contained an insufficient majority of black voters, both to ensure in the first instance that its plans comply with the principles of Section 2 and to provide this Court with an adequate basis for appellate review.[11]

ii. The court also appears to have accorded undue deference to "state policy" in formulating its plans, placing

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[10] Although it is not clear from the court's discussion, the court may have based its 50% figure on the Fourth Circuit's conclusion that a particular North Carolina electoral district with a 51.8% black voting age population could be considered an opportunity district. See SRAC J.S. App. 48 (citing *McGhee* v. *Granville County*, 860 F.2d 110 (4th Cir. 1988)). It would not, of course, be appropriate to adopt particularized findings relevant to a specific district in North Carolina as a general standard applicable throughout South Carolina.

[11] In rejecting the notion (which we do not understand appellants to urge) that it should apply a bright-line "65 percent rule" in judging effective minority voting strength, the court did state that in formulating its plans it had used voting-age population figures and had taken specific account of "other factors" that might otherwise have justified a supermajority requirement. SRAC J.S. App. 48-50. But the court's discussion dealt only with the possible effect of incumbents on black voter turnout, and it did so only in cursory fashion. *Id.* at 49-50. The opinion includes no particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as black "opportunity districts" in the face of plaintiffs' challenge to that characterization.

primary emphasis on preserving county and precinct lines. SRAC J.S. App. 13-16. While state policy is one factor to be considered under the "totality of the circumstances" test for determining compliance with Section 2, *Houston Lawyers' Ass'n* v. *Attorney General,* 111 S. Ct. 2376, 2381 (1991), the court's deference here was unjustified for two reasons.

First, it is not clear that preservation of county or precinct lines is an important or consistent state policy. Certainly it was not, in this case, a policy embodied in an official redistricting plan forged through the State's political process. See, *e.g., White* v. *Weiser,* 412 U.S. at 795-796 (quoted at SRAC J.S. App. 14-15). See also SRAC J.S. App. 16-17 (noting that the redistricting proposals submitted by various state officers or legislative bodies were not entitled to deference as state policy). That policy was instead deduced by the district court from the state Constitution and from a "historical analysis of the redistricting efforts of the South Carolina Senate." *Id.* at 15. The most recent source cited by the court was a plan enacted in 1972, *id.* at 15-16; the court did not analyze the extent to which county or precinct lines were preserved in the plans adopted after the 1980 census. See also Campbell J.S. App. 18-19 (Governor's veto message, questioning policy of not splitting precinct lines); *Jeffers* v. *Clinton,* 730 F. Supp. at 214-215 (even "fairly strong policies" carry little weight if not consistently applied); *Houston Lawyers' Ass'n,* 111 S. Ct. at 2381 (rejecting reliance on "trivial or illusory" state interests).[12]

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[12] In contrast to its deference to the supposed state policy of preserving political boundaries, the court announced that it would give no preference to incumbents because that was not a "legitimate concern" for a court to take into account in fashioning a plan. SRAC J.S. App. 64-65, 75. The court nonetheless severely criticized various of the parties' proposals for protecting or attempting to eliminate incumbents on partisan grounds, *id.* at 65 & n.61, 74-75,

Second, as this Court recognized in *Houston Lawyers' Ass'n*, the State's interest "is merely one factor to be considered in evaluating the 'totality of circumstances,' " and "that interest does not automatically, and in every case, outweigh proof of racial vote dilution." 111 S. Ct. at 2381. At least in formulating its plans for the General Assembly, the district court's opinion indicates that the court was guided almost entirely by concern for following political boundaries, see SRAC J.S. App. 62-78; it did not consider that state policy, such as it may be, as just one factor to be weighed under the totality of the circumstances. That error was compounded by the court's misconception that it was not required to grapple fully in this case with the requirements of Section 2. See, *e.g.*, *id.* at 79 (expressing court's conclusion that its plan for the state House of Representatives satisfies the Voting Rights Act "given the nature of this proceeding"). Instead, in each disputed instance, the court should have evaluated what it viewed as the State's policy preferences in light of the extent of racial polarization in the locality involved and the existence of a black population capable of forming a majority in a compact and contiguous district.[13] Once again, the court's failure to conduct such

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and ultimately declared that its plan was best in "avoiding the 'political thicket' that arises in pitting large numbers of incumbents against one another." *Id.* at 75. If there is in fact a consistent state policy of protecting incumbents, the court may consider it in fashioning a plan. See, *e.g.*, *Jeffers* v. *Clinton*, 730 F. Supp. at 214-215. To do so, however, the court must find such a policy based on specific evidence or legal sources, and must evaluate its application to ensure that protecting incumbents (of whatever political party) does not dilute minority voting strength in violation of Section 2. See *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991).

[13] The district court rejected plans creating more black-majority districts with the general statement that they did so "without regard to any interest but race and without the clear necessity which justifies a § 2 remedy." SRAC J.S. App. 76. But the court could not adequately support its conclusion that the proposed districts

a district-by-district evaluation both calls into question the validity of its plans under Section 2 and renders orderly appellate review of those plans (and the legal and factual conclusions on which they are based) unnecessarily difficult.

3. We believe that under the circumstances of this case the district court erred in failing to consider thoroughly whether its remedial redistricting plans comply fully with Section 2. In formulating such plans, a court is obligated to "exercise its traditional equitable powers to fashion the relief so that it * * * fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). See generally *Wise* v. *Lipscomb*, 437 U.S. 535, 541 (1978); *Connor* v. *Finch*, 431 U.S. 407, 415 (1977).

Given the time constraints that the court faced at the time, we do not question its decision to impose its plans in their current form for purposes of the 1992 elections. But because the court's "interim" plans may as a practical matter remain in place for the next decade, we think that the court was required to afford all parties the opportunity to present specific Section 2 objections before imposing those plans for use in future elections. The court should have received and reviewed evidence concerning each challenged district, considered that evidence in light of all of the relevant factors enumerated in *Gingles*, and included in its opinion specific, reviewable findings of fact and conclusions of law with respect to each such district's compliance with federal law. Such a process would be fair to the parties, present the district court with a judicially manageable task, take advantage of the district court's considerable familiarity with the specific facts

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were unjustified without considering the totality of the circumstances in each disputed area, 42 U.S.C. 1973(b), in light of all the considerations enumerated by this Court in *Gingles*.

and arguments in this case, and properly assist this Court in its appellate review.

CONCLUSION

The judgment of the district court should be vacated and the case should be remanded with instructions to the district court to determine whether its plans, to the extent they are applicable to post-1992 elections, comply in all respects with Section 2 of the Voting Rights Act.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
REBECCA K. TROTH
Attorneys

MAY 1993

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 3-91-2983-1
(Three-Judge Court Requested)

MICHAEL G. BURTON as Executive Director and on behalf of the Republican Party, WILLIAM P. COLLINS, III, EARL COPELAND, WILLIAM PATRICK FLACK, FRANK E. GIBSON, III, NANCY D. HAWK, and GUS ROBERTS, PLAINTIFFS

v.

ROBERT J. SHEHEEN, in his representative capacity as Speaker of the South Carolina House of Representatives, NICK THEODORE, in his representative capacity as presiding officer of the South Carolina Senate, JAMES B. ELLISOR, in his representative capacity as Executive Director of the State Election Commission and CARROLL A. CAMPBELL, JR. in his representative capacity as the Governor of South Carolina, DEFENDANTS

[Filed Oct. 4, 1991]

COMPLAINT

(Declaratory Judgment; Equitable Relief Sought)

A. PRELIMINARY STATEMENT

1. Plaintiffs request that this Court draw a reapportionment plan for the General Assembly of the state of South Carolina and for the Congressional

delegation of the state of South Carolina for the 1992 elections. This action is necessary because the South Carolina Senate and the South Carolina House of Representatives in General Assembly have failed by means of the legislative process to produce a reapportionment plan for either the General Assembly or the Congressional delegation. That process is deadlocked. Without this court's action, rights secured to the people of South Carolina pursuant to Article I, Section 2 of the Constitution of the United States, the Fourteenth and Fifteenth Amendments of the Constitution of the United States and pursuant to 42 U.S.C. Section § 1973 *et seq.* and 1983 will be violated as the House and Senate districts of the South Carolina General Assembly and the Congressional districts are no longer apportioned according to the principle of one person one vote. This court's intervention is necessary in order to have a plan in place for the election process in 1992.

B. JURISDICTION

2. Jurisdiction is conferred on this court pursuant to 28 U.S.C. 1331 and 1343 and 28 U.S.C. 2201.

3. A three-judge district court is required pursuant to 28 U.S.C. 2284(a) because this action challenges the constitutionality of the apportionment of statewide legislative bodies and of Congressional districts.

(b) Pursuant to 28 U.S.C. 2284(b)(2) notice of this action has been given to the Governor and the Attorney General of the State of South Carolina by sending each via certified mail a copy of this complaint.

C. THE PARTIES

4. Michael Burton is a registered voter of the State of South Carolina residing in Columbia, SC, and is the executive director of the State Republican Party. He submitted on behalf the Republican Party a plan for reapportionment of the South Carolina Senate.

5. William P. Collins, III is a registered voter of South Carolina, residing in Chapin and is under-represented in the State House and Senate (Districts 85 and 23) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of one person one vote.

6. Earl Copeland is a registered voter of the State of South Carolina, residing in Hanahan, and is under-represented in the State House and Senate (Districts 99 and 38) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of the one person one vote.

7. William Patrick Flack is a registered voter of the State of South Carolina, residing in Anderson, and further is a member of the black population of South Carolina which is under-represented in the State Senate, House of Representatives, and in the Congressional delegation within the state.

8. Frank E. Gibson, III, is a registered voter of the State of South Carolina, residing in Beaufort, and is under-represented in the State House and Senate (Districts 124 and 46) because of population changes such that the South Carolina House and Senate are no longer apportioned on the basis of one man one vote.

9. Nancy D. Hawk is a registered voter of the State of South Carolina, residing in Charleston (1st

Congressional District), and is under-represented in the Congress of the United States because of population changes such that the South Carolina Congressional districts are no longer apportioned on the basis of one person one vote.

10. Gus Roberts is a registered voter of the State of South Carolina, residing in Columbia, and further is a member of the black population of South Carolina which is under-represented in the State Senate, House of Representatives, and in the Congressional delegation within the state.

11. The defendants are sued in their representative capacity as officers of the State of South Carolina and its legislature in Richland County at Columbia.

12. Robert J. Sheheen is sued in his representative capacity as Speaker of the State House of Representatives, an arm of the South Carolina General Assembly which together with the South Carolina Senate has failed to adopt a reapportionment plan for submission to the Governor.

13. Defendant Nick Theodore is the Lt. Governor of the State of South Carolina and the presiding officer of the State Senate, an arm of the South Carolina General Assembly which together with the South Carolina House of Representatives has failed to adopt a reapportionment plan for submission to the Governor.

14. James B. Ellisor is sued in his representative capacity as the Executive Director of the State Election Commission and the state officer charged with carrying out elections.

15. Carroll A. Campbell, Jr. is sued in his representative capacity as the Governor of the State of South Carolina, the constitutional officer of the state

to whom the General Assembly failed to present a reapportionment plan.

FOR A FIRST CAUSE OF ACTION

D. One Person One Vote

16. There has been a significant shift in population among the South Carolina Senate districts, the South Carolina House of Representatives districts, and the South Carolina Congressional districts, as is disclosed by the 1990 decennial census.

17. The South Carolina Senate and House of Representatives in General Assembly and the Congressional districts of South Carolina are no longer apportioned according to the principle of one man one vote, as required by the United States Constitution.

18. The South Carolina General Assembly has not produced for signature of the Governor a plan for the reapportionment of the State Senate, the State House Representatives, or the Congressional districts within South Carolina and is in adjournment until January 1992.

19. The reapportionment process is deadlocked in that neither the South Carolina House or Senate has adopted each others plans for its own chamber and for Congress and the Governor has advised he will veto those plans if they were presented to him.

20. The General Assembly will not reconvene until January 1992 thereby ensuring that a reapportionment plan will not be timely adopted with the result that citizens will not reasonably know within which district they may run for office or who their candidates will be, the boundaries of the districts and who the inhabitants of the districts will be.

21. Candidates for the South Carolina Senate and the South Carolina House of Representatives must file their notices of candidacy and pledge by March 30, 1992 in order to take part in primary elections as nominees of a political party for the State Senate or House of Representatives, all pursuant to 1976 South Carolina Code § 7-11-210.

22. Candidates as members of Congress must file their notices of candidacy and pledge by April 30, 1992 in order to take part in a primary election as a members of a political party for such seat, all pursuant to 1976 South Carolina Code § 7-11-210.

23. Two weeks prior to the dates set out in the two paragraphs above, advertisements in newspapers trigger the filing periods for the offices set forth above, pursuant to 1976 South Carolina Code § 7-13-45.

24. 1976 South Carolina Code § 7-13-40 requires that the political parties utilizing primary elections hold their primary elections on the second Tuesday in June, i.e. June 9, 1992.

25. Citizens of South Carolina who will participate as electors in the above primaries must register to vote no later than 30 days prior to that primary date, i.e. May 9, 1992.

26. South Carolina is a jurisdiction covered by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

27. Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c prohibits the enforcement in South Carolina of any legislative reapportionment plan which has not first been approved by a declaratory judgment action in the United States District Court for the District of Columbia *or* has

been submitted to the Attorney General of the United States and was the subject of no objection within a sixty (60) day period following information, thereby extending for another sixty days the time before a plan may be implemented.

28. It is unreasonable to rely upon any reapportionment plan produced through the South Carolina legislative process being adopted such that at least sixty (60) days will elapse following final approval of the plan before the electorial process begins, the minimum time required for Justice Department preclearance.

29. The present apportionment of the South Columbia Senate and the South Carolina House of Representatives as described above results in plaintiffs being under represented, does not comply with the one person one vote principle for legislative apportionment, and denies plaintiffs their right to equal protection under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

30. The present apportionment of South Carolina's Congressional districts results in over representation and under representation and is therefore in violation of Article I § 2 of the Constitution of the United States, providing in part that members of the House of Representatives be chosen "by the People of the several states" requiring as nearly as practicable that such person's vote in a Congressional district be equal.

31. Given the requirements of the Voting Rights Act of 1965, as amended, and the statutory frame work for elections in South Carolina, it is clear that without the intervention of the court in reapportioning South Carolina that elections will not be held in a manner which will fairly permit seriously contested elections as there will be insufficient time to recruit

qualified candidates within new district lines, thereby giving incumbents unfair advantage and causing irreparable harm to plaintiffs and others.

32. Plaintiffs' votes are and will be diluted in individual districts as are the votes of other voters across the state if the court does not intervene expeditiously so as to reapportion the state on a timely basis; an untimely reapportionment will so favor incumbents so as to put challengers at an unfair disadvantage, thus causing plaintiffs, voters and candidate alike to suffer harm and irreparable damage.

FOR A SECOND CAUSE OF ACTION

E. VIOLATION OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

33. The plaintiffs reallege paragraphs 1 through 28 as if restated here verbatim.

34. The present apportionment of the South Carolina Senate, of the South Carolina House of Representatives, and of the Congressional districts in South Carolina is in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, in that the black citizens of South Carolina, a protected class under the statute, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

35. The South Carolina Senate has 10 black majority districts out of 46; the South Carolina House of Representatives has 27 black majority districts out of 124; there is no black majority district among the six Congressional districts in South Carolina.

36. The distribution of population throughout the state of South Carolina permits the creation of 14

black majority Senate districts rather tha[n] 10, 35 majority black House districts rather than 27, and 1 black Congressional district rather than none.

37. In the South Carolina House of Representatives the distribution of the black population would permit the creation of 35 black majority districts with black percentage populations as follows:

Districts over 60%—	20
Districts between 55-60%—	11
Districts between 50-55%—	4

38. The creation of such House districts would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

39. The distribution of the population in South Carolina would permit the creation of 14 black majority Senate districts with black percentage populations as follows:

Districts over 60%—	8
Districts between 55-60%—	5
Districts between 50-55%—	1

40. The creation of such Senate districts would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

41. The distribution of population in South Carolina would permit the creation of at least 1 black-majority Congressional district with a black percentage population approximating 65%.

42. The creation of such Congressional district would increase the opportunity of blacks to participate in the political process and elect representatives of their choice either by electing candidates expressing wholly their own views or electing candidates with whom they would have very significant influence.

43. The present apportionment of the South Carolina Senate, of the House of Representatives and of the Congressional districts is in violation of the Voting Rights Act of 1965, as amended, because the effect of the present system is to under represent blacks in the South Carolina General Assembly and in the South Carolina Congressional delegation.

44. The geographical compactness of the black population is sufficient to create the districts described above.

45. There is among the minority population of South Carolina a political cohesion making such districts possible.

46. There is in South Carolina a history of bloc voting by the majority population which continues to this day.

47. Failure to apportion the South Carolina House, Senate and Congressional districts according to the Voting Rights Act of 1965, as amended, will cause irreparable harm to black plaintiffs and will cause irreparable harm to plaintiffs generally as compliance with the act is necessary for a lawful reapportionment under which to conduct elections in 1992.

Wherefore, plaintiffs pray

1. That the court find and declare:

    a. That the present apportionment of the South Carolina Senate and House of Representatives is in violation of the Fourteenth Amendment to the United States Constitu-

tion and 42 U.S.C. § 1983 in that the districts are not fair and equal, as practicable;

b. That the present apportionment of the South Carolina Congressional districts is in violation of Article I, § 2 of the United States Constitution in that the districts are not fair and equal, as practicable;

c. That the present apportionment of the South Carolina Senate and House of Representatives is in violation of 42 U.S.C. § 1973 et seq. and the Fifteenth Amendment to the United States Constitution;

d. That the present apportionment of the South Carolina Congressional districts is in violation of Article I, § 2 of the United States Constitution and 42 U.S.C. § 1973; and

e. That the legislative process in South Carolina is at an impasse and that without the court's intervention reapportionment will not occur so as to be available to provide to the citizenry time within which it is practicable to recruit candidates, declare as candidates, and campaign with knowledge of district boundaries, all to the irreparable harm of plaintiffs.

2. That the court adopt and impose on defendants:

a. An Injunction prohibiting the use of the present South Carolina Senate, House and Congressional district lines for the 1992 elections;

b. A reapportionment plan for the South Carolina Senate and House of Representatives;

c. A reapportionment plan for the South Carolina Congressional districts;

d. A reapportionment plan for the General Assembly and Congressional districts which complies with the requirements of the Voting Rights Act of 1965, as amended, with such plan creating 35 black majority seats in the House, 14 black majority seats in the Senate; and 1 black Congressional district.

3. That the court impose such reapportionment plan by December 31, 1992.

4. That court award to plaintiffs reasonable attorney's fees and costs as provided by 42 U.S.C. § 1988 et seq.

5. That the court grant such other and further relief as the court may deem just and proper.

Oct. 3, 1991

SINKLER & BOYD, P.A.

By: /s/ Thomas R. Gottshall
THOMAS R. GOTTSHALL
Federal I.D. No. 2406

By: /s/ Steve A. Matthews
STEVE A. MATTHEWS
Federal I.D. No. 5119

The Palmetto Center
1426 Main Street, Suite 1200
Columbia, SC 29201
(803) 779-3080

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:91-3310-1
(Three-Judge Court Requested)

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, DR. WILLIAM GIBSON, BISHOP FREDERICK CALHOUN JAMES, REV. HERBERT WILLIAMS, WILLIE B. OWENS, and SOUTH CAROLINA STATE CONFERENCE OF THE NAACP BRANCHES, Plaintiffs

vs.

CARROLL A. CAMPBELL, JR., in his official capacity as Governor of South Carolina; NICK THEODORE, in his official capacity as Lieutenant Governor and presiding officer of the South Carolina Senate; ROBERT J. SHEHEEN, in his official capacity as Speaker of the South Carolina House of Representatives; and, JAMES B. ELLISOR, in his official capacity as Executive Director of the South Carolina State Election Commission, Defendants

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[Filed Oct. 31, 1991]

COMPLAINT

I. *The Nature of the Case*

1. This is an action to enforce Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the

First, Thirteenth, Fourteenth and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina. Plaintiffs seek declaratory and injunctive relief against continued use of the existing congressional and legislative districts in South Carolina on the grounds that they are malapportioned on the basis of population and dilute minority voting strength. Plaintiffs also seek court ordered, interim redistricting plans on the ground that the General Assembly has failed to apportion the state's congressional and legislative districts following the 1990 Census, and there is not enough time prior to the next elections for the General Assembly to redistrict and comply with the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

II. *Jurisdiction*

2. Plaintiffs invoke the jurisdiction of this Court under 28 U.S.C. §§ 1331, 1343(a)(4), and 2201, this suit being authorized by 42 U.S.C. §§ 1973j(f) and 1983. A three judge court is required by 28 U.S.C. § 2284(a) to hear plaintiffs' challenge to the constitutionality of the apportionment of the state's congressional and legislative districts.

III. *Parties*

3. Plaintiff Statewide Reapportionment Advisory Committee (SRAC) is an unincorporated association of private individuals and organizations in South Carolina. Its goals include insuring that elections are held for Congress and the General Assembly in a timely manner, and in conformity with the Voting Rights Act and the Constitution of the United States.

SRAC sues on its own behalf and on behalf of its members.

4. Plaintiffs Dr. William Gibson, Bishop Frederick Calhoun James, Rev. Herbert Williams and Willie B. Owens, are black, or African-American, residents and registered voters of South Carolina. They desire to participate in the electoral and political processes of South Carolina in a timely manner and on an equal basis with white residents.

5. The personal plaintiffs reside in congressional and legislative districts which are malapportioned on the basis of population, and some of the plaintiffs reside in areas where black majority congressional and legislative districts can be drawn.

6. Plaintiff South Carolina State Conference of the NAACP Branches (NAACP) is an organization composed of the county branches of the NAACP in South Carolina. The NAACP is a membership organization whose goals include securing the equal treatment of blacks and other citizens in the electorate without regard to race or color. The NAACP sues on its own behalf, and on behalf of its branches and members.

7. Defendant Carroll A. Campbell, Jr. is a resident of South Carolina and is the chief executive officer and Governor of South Carolina. He may on extraordinary occasions convene the General Assembly in extra session, and has the duty of signing or vetoing bills which have passed the General Assembly before they become law. He is sued in his official capacity.

8. Defendant Nick Theodore is a resident of South Carolina and is the Lieutenant Governor of South Carolina. He is the President of the Senate, ex officio, one of two branches of the General Assembly in which

is vested the legislative power of the state. He is sued in his official capacity.

9. Defendant Robert J. Sheheen is a resident of South Carolina and is the Speaker of the House of Representatives, one of two branches of the General Assembly in which is vested the legislative power of the state. He is sued in his official capacity.

10. James B. Ellisor is a resident of South Carolina and is the Executive Director of the State Election Commission, which has general supervisory authority over elections in the state. He is sued in his official capacity.

IV. *Facts*

11. The General Assembly has the duty under state and federal law (S.C. Constitution, Art. III, § 3; U.S. Constitution, Article I, Section 2) of reapportioning congressional and legislative districts in South Carolina every ten years based upon a true and correct enumeration of inhabitants.

12. Based upon the 1990 Census, the existing congressional districts in South Carolina contain a total deviation from ideal district size of 8.3%, and are malapportioned on the basis of population in violation of Article I, Section 2 of the Constitution.

13. Based upon the 1990 Census, the existing districts for the House of Representatives contain a total deviation from idea district size of 113.9%, and are malapportioned on the basis of population in violation of the one person, one vote principle of the Fourteenth Amendment.

14. Based upon the 1990 Census, the existing districts for the Senate are malapportioned on the basis of population in violation of the one person, one vote principle of the Fourteenth Amendment.

15. Despite the malapportionment of existing congressional and legislative districts, the General Assembly considered but failed to enact any redistricting plans at its last (1991) legislative session.

16. The General Assembly, which is in adjournment until January 14, 1992, is at an impasse as far as reapportionment is concerned because of disagreement between the House of Representativs and the Senate over congressional and legislative district boundaries.

17. The Governor has stated publicly that he would veto any of the redistricting plans considered by the General Assembly during its 1991 regular session, and has refused to convene the General Assembly in extra session to consider and enact congressional and legislative redistricting.

18. Primary elections for Congress and the General Assembly are scheduled for June 9, 1992, and the general election is scheduled for November 10, 1992.

19. Candidates in the primary elections for the House of Representatives and Senate must file their notices of candidacy and pledge by 12:00 o'clock noon, March 30, 1992 (S.C. Code § 7-11-210).

20. Candidates in the primary elections for Congress must file their notices of candidacy and pledge by 12:00 o'clock noon, April 30, 1992 (*Id.*).

21. Two weeks before the filing period begins—on March 15, 1991 for general assembly elections and April 15, 1991 for congressional elections—party officials are required to place an advertisement in a newspaper of general circulation notifying the public of the dates of the filing period, the offices which may be filed for, and the manner in which filing may be made (S.C. Code § 7-13-45).

22. South Carolina is covered by the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, with the result that no congressional or legislative redistricting plan enacted by the General Assembly and signed into law by the Governor can be implemented unless and until it is precleared, either administratively by the Attorney General or judicially by the Federal District Court for the District of Columbia.

23. The Attorney General has a period of sixty (60) days from the date a submission is deemed complete within which to object, and may extend the preclearance period for an additional sixty (60) if he requests additional information.

24. The Subcommittee on Reapportionment and Redistricting of the Senate Judiciary Committee issued a time line for reapportionment which contemplated that congressional and legislative redistricting plans be submitted for preclearance no later than November, 1991 in order to provide adequate time for Section 5 review.

25. Given the impasse over congressional and legislative redistricting in the General Assembly, the Governor's refusal to call a special legislative session to consider and enact redistricting, the Governor's statement that he would veto the redistricting that was being considered by the General Assembly, and the requirement of Section 5 preclearance, it is a virtual certainty that the state will not be able to enact and implement congressional and legislative redistricting in compliance with the Voting Rights Act and the Constitution prior to the next elections in 1992.

26. Blacks in South Carolina are sufficiently numerous and geographically compact that they would

constitute a majority in one or more single-member districts for Congress and both houses of the General Assembly.

27. Under the existing apportionment, all of the state's congressional districts are majority white, although it is possible to draw at least one reasonably compact and contiguous congressional district that contains a majority of black residents.

28. Under the existing apportionment, there are ten (10) out of forty-six (46) senate districts that contain a majority of black residents, although it is possible to draw at least fourteen (14) reasonably compact and contiguous senate districts that contain a majority of black residents.

29. Under the existing apportionment, there are twenty-seven (27) out of 124 house districts that contain a majority of black residents, although it is possible to draw thirty-seven (37) or thirty-eight (38) reasonably compact and contiguous house districts that contain a majority of black residents.

30. Blacks in South Carolina are politically cohesive, in that they tend to vote as a bloc, have common socio-economic characteristics and have organized themselves collectively for political activity.

31. Candidates for elective office preferred by blacks in South Carolina are usually defeated by the white majority voting as a bloc.

32. Historically, black residents of South Carolina have been subject to private as well as official discrimination on the basis of race, including discrimination in attempting to exercise their right of franchise and to participate equally with white residents in the political processes.

33. Black residents of South Carolina bear the effects of discrimination on the basis of race in educa-

tion, housing, employment, and health services which have resulted in a lower socio-economic status which hinders their ability to participate effectively in the political process.

34. Voting in South Carolina is racially polarized.

35. The existing congressional and legislative districting in South Carolina dilutes the voting strength of blacks.

36. The use of a majority vote requirement in primary elections for Congress and the General Assembly enhances the opportunity for discrimination and further dilutes minority voting strength.

37. Because of the existing discriminatory districting for Congress and the General Assembly, black residents of South Carolina have been discouraged from running for office.

38. No black has ever been elected to Congress from South Carolina in modern times, and blacks have been elected to the General Assembly primarily from districts in which members of their race were the majority.

39. Blacks in South Carolina have less opportunity than white residents to participate in the political processes and to elect candidates of their choice.

40. The policy underlying the existing congressional and legislative districting in South Carolina is tenuous.

41. The purpose and result of the existing congressional and legislative districting in South Carolina is to deny or abridge the right of black residents to vote on the basis of race or color.

42. If the existing congressional and legislative districting are used in the 1992 elections, or if the state postpones or delays the elections because of its

inability to enact redistricting and comply with the preclearance requirements of Section 5, plaintiffs will be seriously injured and their right to vote will be diluted or denied.

43. Plaintiffs have brought this action at the present time to insure that the issues presented herein may be considered in a timely manner, and that any remedies for the denial of plaintiffs' rights, including interim, court ordered elections, may be implemented in an orderly fashion with a minimum of disruption to candidates and voters, and to the electoral process.

44. The defendants' actions complained of herein are under color of law of the State of South Carolina.

First Cause of Action

45. The defendants' actions in using and maintaining the existing congressional and legislative districts in South Carolina, which are malapportioned on the basis of population and result in the denial or abridgment of the right to vote on the basis of race or color, deny plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the First, Thirteenth, Fourteenth and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States.

Second Cause of Action

46. The existing congressional and legislative districts in South Carolina were enacted and are being maintained with the racially discriminatory purpose of diluting the voting strength of black residents of South Carolina in violation of plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, and the

First, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States.

Third Cause of Action

47. The refusal or failure of defendants to reapportion congressional and legislative districts in South Carolina based upon a true and correct enumeration of inhabitants denies plaintiffs' rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina.

V. *Equitable Relief*

48. A real and actual controversy exists between the parties. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief. Plaintiffs are suffering irreparable injury as a result of the violations complained of herein and that injury will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, plaintiffs respectfully pray that this Court:

(1) take jurisdiction of this case;

(2) enter a declaratory judgment that the use of the existing congressional and legislative districts in South Carolina violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the First, Thirteenth, Fourteenth, and Fifteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina, and enter a permanent injunction against their further use;

(3) enter a declaratory judgment that the refusal or failure of the defendants to reapportion congressional and legislative districts in South Carolina based upon a true and correct enumeration of inhabitants, violates the due process and equal protection clauses of the Fourteenth Amendments and Article I, Section 2 of the Constitution of the United States, and Article III, Section 3 of the Constitution of South Carolina and enter a permanent injunction enjoining defendants from failing promptly and immediately to reapportion congressional and legislative districts in accordance with Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, and the Fourteenth Amendment of the Constitution of the United States;

(4) implement interim, court ordered congressional and legislative redistricting to insure that the 1992 primary and general elections are held as scheduled;

(5) award plaintiffs the cost of this action together with their reasonable attorney's fees; and,

(6) retain jurisdiction of this action and grant plaintiffs any further relief which may in the discretion of this Court be necessary and proper to ensure that timely and lawful procedures are used in elections in South Carolina for Congress and the General Assembly.

Respectfully submitted,

/s/ Laughlin McDonald
LAUGHLIN MCDONALD
American Civil Liberties
Union Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

/s/ Dennis Courtland Hayes
DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215-3297
(301) 358-8900

JOHN R. HARPER II,
ATTORNEY AT LAW, P.A.

By: /s/ John Roy Harper II
JOHN ROY HARPER II
ID No. 1729
P.O. Box 843
Columbia, S.C. 29202
(803) 771-4723

ATTORNEYS FOR PLAINTIFFS

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Nos. 92-155 and 92-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,
Appellants,
v.
NICK THEODORE, *et al.*,
Appellees.

CARROLL A. CAMPBELL, JR.,
GOVERNOR OF SOUTH CAROLINA,
Appellant,
v.
NICK THEODORE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee South Carolina Senate

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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No. 92-155

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

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No. 92-219

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

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SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES

Pursuant to Sup. Ct. R. 18.9, Appellee South Carolina State Senate ("Senate") files this supplemental brief to address the recently filed *amicus curiae* brief of the United States ("U.S. Br.").

1. At the outset, the Senate notes that the United States concedes several key points made in the Senate's Motion to Dismiss or Affirm ("Sen. Br."):

a. The Senate pointed out in its opening brief that all the parties stipulated that the existing districting plans (*i.e.*, those developed after the 1980 census) violated the one person, one vote rule. Sen. Br. at 4-5. The United States agrees with the Senate that, in light of this stipulation, there was no need for the court to consider the additional claim of the Statewide Reapportionment Advisory Committee ("SRAC") that they violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. U.S. Br. at 9-10. Rather, the three-judge court "properly focused on the nature of the new plans that should be put in place." *Id.* at 10. This concession is significant, because the SRAC has argued that the existing plans violated Section 2 and the court therefore had the obligation to remedy this violation by drawing more districts with black majorities.

b. The United States also agrees that, when the three-judge court decided on new redistricting plans, "it was appropriate for the court to consider" the principles contained in Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits changes in election law that have the purpose or effect of denying or abridging voting rights on account of race. *Id.* at 10.

c. The United States does not address the three-judge court's treatment of the Section 5 issues, but rather limits its brief to the lower court's application of Section 2. On this latter issue, the United States (like the Senate) "agree[s] with the court below that the three 'necessary preconditions' identified in [*Thornburg* v.] *Gingles*, 478 U.S. [30,] 50-51 [(1986)], are 'threshold requirements' for imposing a Section 2 remedy." *Id.* at 12 n. 9.[1] Furthermore,

[1] These preconditions are (1) that the minority group must be sufficiently numerous and compact to constitute a majority in a single-member district; (2) that the minority group must be politically cohesive; and (3) that the group's preferred candidates must usually lose elections because of bloc voting by whites. *Gingles*, 478 U.S. at 50-51.

the United States (again, like the Senate) states that, if these three preconditions are not satisfied, a district court need not engage in any further analysis. *Id.* at 12. *See generally INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

d. With respect to the issue of the existence of racially polarized voting, which subsumes two of the three *Gingles* preconditions (minority political cohesiveness and white bloc voting), U.S. Br. at 12 n.8, the United States "agree[s] with the Senate appellees that evidence of racial polarization or other factors would have to be more localized and specific to support creating or rejecting a challenged electoral district on Section 2 grounds." *Id.* at 13.[2]

e. Finally, the United States agrees with the Senate that the three-judge court had the right to order use of its plans for the 1992 elections because of the time pressure it faced. *Id.* at 11, 18.

2. The Senate parts company with the United States, however, on the question of whether the three-judge court's plans should be used for future elections. The United States argues that they should not. In doing so, it relies on some (but not all) of the arguments raised by Appellants.

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[2] The United States goes on, however, to argue that the court failed to make "specific findings rejecting the evidence of polarization in particular districts." *Id.* The Senate addresses this argument in Point 2.a., *infra*. As to the remaining *Gingles* precondition (compactness), the United States argues that the three-judge court "did not respond adequately to the question whether additional compact and contiguous districts with black majorities could and should have been created." U.S. Br. at 13. The supposed flaws in the three-judge court's treatment of this question, however, appear to the United States to be the court's failure to determine the extent of racially polarized voting and its allegedly undue deference to the State's policy of preserving county lines in districting. *Id.* at 14-18. The Senate discusses these issues in Points 2.b.-2.d., *infra*.

The United States does not argue for the creation of additional black majority districts or subscribe to the SRAC's position that Section 2 requires maximization of minority voting strength.[3] Instead, the United States's brief focuses primarily on the argument (also made by the SRAC and the Governor) that the three-judge court failed to give adequate consideration to the requirements of Section 2. The Senate discussed this argument in some detail in its Motion to Dismiss or Affirm, Sen. Br. at 13-17, and will not reiterate its position at length, but rather will attempt to respond to the flaws in the *amicus* brief.

a. The United States argues that "the district court explicitly refused to resolve the issue of polarized voting," U.S. Br. at 13, citing the court's statement that " 'the extent to which voting is polarized in South Carolina remains an open question.' " *Id.* (quoting SRAC J.S. App. 56). To say that the existence of racial bloc voting is an open question is not, as the United States claims, tantamount to refusing to decide the issue. Rather, given that the burden of proof was on those seeking to justify the creation of additional black majority districts, *Gingles*, 478 U.S. at 50-51, and the extensive (if unpersuasive) evidence Appellants offered on this issue, the court's statement is tantamount to saying that these parties failed to meet their burden.

b. The United States contends that, because of what it views as the three-judge court's inadequate treatment of the polarized voting issue, "there was no basis for the court's finding that any district in which blacks constitute

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[3] *See* U.S. Br. at 9 ("We take no position at this time as to whether the redistricting plans adopted by the court would in fact violate Section 2 if applied to elections held subsequent to 1992."). As the Senate has noted, however, the Solicitor General has previously stated that "[n]othing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts . . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Voinovich v. Quilter*, No. 91-1618 (U.S. filed July 31, 1992).

more than 50% of the voting age population may be considered a 'black opportunity district.'" U.S. Br. at 14 (quoting SRAC J.S. App. 48). The court did not, however, simply adopt a 50% figure. Instead, it explicitly stated that it had considered other factors besides voting age population ("VAP"), such as the presence of an incumbent in a given district, in formulating the plans. Sen. Br. at 23.[4]

c. The United States similarly contends that the three-judge court gave short shrift to plaintiffs' argument that "a district should have a black *voting-age* population of at least 57% in order for black voters to have a realistic chance of electing their preferred candidates." U.S. Br. at 15 (emphasis added). In fact, the plaintiffs contended that a district had to have a *total* population that was more than 57% black to give black voters such an opportunity. Sen. Br. App. at 19a. The difference is a significant one, because a district with a 57% black total population will have a voting age population that is only 52-53% black—a figure strikingly close to the 50.1% figure for which the United States claims the court had no basis.

d. The United States argues that, in derogation of Section 2, the district court gave undue deference to the State's interest in drawing redistricting plans that preserved county lines. *See* U.S. Br. at 15-16. This argument completely ignores the Senate's contention that adherence to county lines is entirely consistent with Section 2. *See* Sen. Br. at 26-27.

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[4] The United States complains in a footnote that the three-judge court's consideration of these other factors was inadequate because it did not include a "particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as 'black opportunity districts' in the face of plaintiffs' challenge to that characterization." U.S. Br. at 15 n.11. Plaintiffs' challenge, however, was not so much to the court's characterization of certain districts as black opportunity districts as it was to the court's failure to draw additional districts with black VAP majorities.

e. Summarizing its arguments, the United States contends that the three-judge court should have (i) "received and reviewed evidence concerning each challengd district," (ii) "considered that evidence in light of . . . *Gingles*," and (iii) made "specific, reviewable findings of fact and conclusions of law." U.S. Br. at 18. Each of these three claims is without merit.

First, the United States shares the parties' view that "the court had before it substantial evidence relevant to the factors identified in *Gingles* as probative of minority vote dilution in violation of Section 2." U.S. Br. at 12-13. Moreover, Appellants, who were represented by experienced counsel, had ample opportunities to offer district-specific evidence regarding the merits of the additional black VAP majority districts that they proposed. Indeed, they availed themselves of these opportunities and offered expert testimony in an effort to convince the three-judge court that Section 2 required the creation of their proposed districts, and the court admitted this evidence. There is thus no basis for arguing that the court should have received more evidence.[5]

Second, as we have shown, the three-judge court considered this evidence in light of *Gingles*. It applied the three *Gingles* preconditions and found Appellants' proof lacking.

Third, as we have also shown, the three-judge court made the necessary findings and conclusions. Furthermore, the United States' contrary argument ignores the fact that this Court may always examine the record to determine whether the evidence supports the decision below. *Sampson v. Murray*, 415 U.S. 61, 87 n.58 (1974). Our opening brief demonstrated that the record here contains more than enough evidence to sustain the three-judge court's judgment. Sen. Br. at 21-28.

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[5] For the same reason, there is no basis for suggesting that, on remand, the three-judge court should give all parties an additional opportunity to offer evidence on the various Section 2 factors as they apply to pre-1992 elections.

f. The *amicus* brief asks this Court to vacate the judgment and remand the case to the district court. In particular, the United States suggests that this Court "direct the district court to consider in detail . . . *objections raised by any party* on the ground that the court's plans do not comply fully with the requirements of Section 2." U.S. Br. at 9 (emphasis added).[6] This form of relief is different from that sought by the Appellants, who asked only that the Court note probable jurisdiction.

g. Moreover, the remand the United States seeks would not be an appropriate form of relief in any event because it would lead to piecemeal litigation. As noted above, the United States takes no position at this time as to whether the three-judge court should draw additional districts with black VAP majorities. All the United States seeks is a remand with instructions to the court to consider whether its plans comply in all respects with Section 2. U.S. Br. at 19.

Such a remand, however, would leave unanswered the critical question in this case—whether the three-judge court should have created the maximum possible number of districts with black VAP majorities—and would deprive the trial judges of this Court's guidance on this key issue. If the three-judge court then reaffirmed its prior plans, which create less than the maximum possible number of districts with black VAP majorities, the Appellants would undoubtedly appeal again, and once more raise the maximization issue. Conversely, if (contrary

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[6] We do not read this suggestion to encompass congressional redistricting, as the Appellants have raised no objections to it. Sen. Br. at 2 n.1. Even if the United States intends for its objections to be directed to the Congressional as well as the State legislative redistricting, we would note that the Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991); *see United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).

to the statutory language, the legislative history, and the case law) the three-judge court did maximize the number of black majority VAP districts, the Appellees would seek review in this Court. Thus, the inevitable result of the relief the Untied States requests would be another appeal and a concommitant waste of judicial resources.

In short, if there were to be a remand, the proper course would be for this Court to decide the maximization question first, in order better to guide the three-judge court in its consideration of the issues on remand. Indeed, in light of the importance of the question not only to this case but to many other redistricting cases at the congressional, state legislative, and local levels that are pending or will arise in the coming years, this Court should give the question plenary consideration, including full briefing and oral argument. The sounder disposition of this case, however, would be to affirm the judgment below on the ground that, for the reasons stated above and in the Motion to Dismiss or Affirm, the three-judge court ruled correctly on the record before it.

Respectfully submitted,

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee
South Carolina Senate

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No. 92-155

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, ET AL,

APPELLANTS.

vs.

NICK THEODORE, ET AL,

APPELLEES.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

APPELLANT,

vs.

NICK THEODORE, ET AL,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

EDWIN E. EVANS
TREVA G. ASHWORTH*
S.C. ATTORNEY GENERAL'S OFFICE
P. O. BOX 11549
COLUMBIA, S.C. 29211
(803) 734-3680

ROBERT J. SHEHEEN
STEPEHEN P. BATES
S.C. HOUSE OF REPRESENTATIVES
P. O. BOX 11867
COLUMBIA, S.C. 29211
(803) 734-3125

ATTORNEYS FOR THE APPELLEE,
ROBERT J. SHEHEEN
*COUNSEL OF RECORD

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Section 2 of the Voting Rights Act is a results test that can only accurately measure the results of a plan once it has been implemented.

II. The Three-Judge Court applied the standards of Section 2 of the Voting Rights Act to the Court ordered redistricting plans.

III. The Three-Judge Court ordered redistricting plans that comply with the Section 2 remedy.

IV. The Three-Judge Court correctly incorporated appropriate state policies in drawing the Court redistricting plans.

V. Section 5 standards of the Voting Rights Act were appropriately applied by the Three-Judge Court in fashioning its Court ordered redistricting plans.

PARTIES TO THE PROCEEDINGS

In the case of Statewide Reapportionment Advisory Committee v. Sheheen, C.A. No. 3:91-3310-1, the Appellants are the Statewide Reapportionment Advisory Committee, D. William Gibson, Bishop Frederick Calhoun James, Rev. Herbert Williams, Willie B. Owens, and South Carolina State Conference of the NAACP Branches. The appellees are Nick Theodore, Lieutenant Governor of South Carolina, Robert J. Sheheen, Speaker of the South Carolina House of Representatives, and James B. Ellisor, the then Executive Director of the South Carolina State Election Commission who were named Defendants in this case and the Intervenors Robin Tallon, Neil A. Vander Linden, Forrest E. Ott, Phillip T. Jones, Ann Y. Hart, Peggy A. Dufek, Gwendolyn L. Grooms, the South Carolina Senate and the South Carolina Democratic Party. Governor Campbell was a Defendant below but is a cross Appellant in this

appeal.

The Statewide Reapportionment Advisory Committee case was consolidated with the case of Burton v. Sheheen, C. A. No. 3:91-2983-1, which had already been filed. The Plaintiffs were Michael G. Burton, as Executive Director and on behalf of the Republican Party, William P. Collins, III, Earl Copeland, William Patrick Flack, Frank E. Gibson, III, Nancy D. Hawk, and Gus Roberts. Kimberly T. Burch was a plaintiff-intervenor. The defendants were Robert J. Sheheen, Nick Theodore, James B. Ellisor, and Carroll A. Campbell, Jr. The defendant-intervenors were Robin Tallon, Neil A. Vander Linden, Forrest E. Ott, Philip T. Jones, Ann Y. Hart, Peggy A. Dufek, Gwendolyn L. Grooms, the South Carolina Senate, and the Democratic Party of South Carolina. Katharine I. Butler was amicus curiae.

In the consolidated case of Blanton v.

Campbell, C.A. No. 3:91-3635-1, the plaintiffs were Bufort Blanton, Neil A. Vander Linden, Forrest E. Ott, Ann Y. Hart, Peggy A. Dufek, and Vincent Johnson. The defendants were Carroll A. Campbell, Jr., Nick Theodore, Robert J. Sheheen, James B. Ellisor, Dorchester County Legislative Delegation, State of South Carolina, Sherry Martschink, Stephen E. Gonzales, Annette Young, Sandra S. Wofford, George H. Bailey, John W. Matthews, Jr., Michael T. Rose, and the South Carolina Senate.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, ET AL,

APPELLANTS.

vs.

NICK THEODORE, ET AL,

APPELLEES.

CARROLL A. CAMPBELL, JR.,
GOVERNOR OF SOUTH CAROLINA,

APPELLANT,

vs.

NICK THEODORE, ET AL,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee, Robert J. Sheheen, Speaker of the South Carolina House of Representatives, moves the Court to either dismiss

the Appeal filed by the Statewide Reapportionment Advisory Committee and the Cross-Appeal of the Honorable Carroll A. Campbell, Governor of the State of South Carolina or in the alternative to affirm the judgment of the Three-Judge Court which redistricted the South Carolina House, South Carolina Senate and Congressional Districts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are the First, Thirteenth, Fourteenth and Fifteenth Amendment and Article I, Section 2 of the United States Constitution, and Article III, Section 3 of the South Carolina Constitution. The statutory provisions involved in this appeal are Sections 2 and 5 of the Voting Rights Act as codified in 42 U.S.C. 1973 and 1973(c). All these provisions, except Article I, Section 2 of the United States Constitution, are set out in the Appendix to the Statewide Reap-

portionment Advisory Committee's Jurisdictional Statement at pages 478 through 485. Article I, Section 2 of the United States Constitution is set out in the Appendix to this Motion. App. 1-3, infra.

STATEMENT OF THE CASE

On October 4, 1991, a case entitled Burton v. Sheheen was instituted in the District Court of the District of South Carolina. The case alleged that the existing South Carolina Senate, House and Congressional plans were malapportioned, that the Legislature and the Governor were deadlocked, and that the Court should draw interim plans. A Three-Judge Court was designated. On October 31, 1991, the Statewide Reapportionment Advisory Committee (SRAC) filed a separate suit basically alleging the same grounds raised in the Burton case and requesting the same relief, SRAC v. Campbell. These two cases were consolidated for trial on November 13, 1991.

A third case was then filed which primarily raised the issue of the constitutionality of County Legislative Delegations, Blanton v. Campbell. This case also was consolidated with the Burton and SRAC case. The issues in Blanton were bifurcated before trial and none of the issues raised in the Blanton case is at issue on appeal.

The Court allowed the South Carolina Senate, the South Carolina Democratic Party, Congressman Robin A. Tallon, Representative Kimberly Burch and individual Defendants Neil A. Vander Linden, Forrest E. Ott, Philip T. Jones, Ann Y. Hart, Peggy A. Dufek and Gwendolyn L. Grooms to intervene in the suit. Kimberly Burch was dismissed by consent prior to the trial.

After the cases were filed in October, Robert J. Sheheen, Speaker of the South Carolina House of Representatives, along with the Senate, moved to dismiss the proceedings on the grounds that the case had

been brought prematurely as there was reason to believe the process was not yet deadlocked and sufficient time remained for the Legislature to draw the plan and receive preclearance prior to the elections. The Legislature reconvened January 14, 1992. On January 23, 1992, the House and Senate adopted and ratified redistricting plans for both the House and Senate and submitted them to the Governor. On January 29, 1992, Republican Governor Carroll Campbell vetoed the plans. On February 5, 1992, the House was unable to override the Governor's veto on the House remap plan, falling four votes short of the necessary two-thirds vote to override. Congressional plans which had been passed in different forms by the House and Senate, became stalled in a Conference Committee. At that point the process finally became deadlocked. Thereafter, the parties withdrew their Motions to Dismiss and agreed not only that the existing dis-

tricts were malapportioned following the 1990 census, but that if timely elections were to be held, the Court would have to implement interim plans. The trial began February 18, 1992, and was concluded on March 6, 1992. An Order was issued on May 1, 1992. The Court's Order redistricted the South Carolina House, South Carolina Senate, and the Congressional Districts. It is from this Order that the Appeal by SRAC and a Cross-Appeal by the Governor has been made.

I.

SECTION 2 OF THE VOTING RIGHTS ACT IS A RESULTS TEST THAT CAN ONLY ACCURATELY MEASURE THE RESULTS OF A PLAN ONCE IT HAS BEEN IMPLEMENTED.

Section 2 of the Voting Rights Act prohibits the implementation of a redistricting plan that results in the dilution of minority voting strength. As a practical matter it is difficult, if not impossible, for a court to consider whether a particular

plan meets Section 2 criteria unless and until that plan has been implemented and elections have been held under the plan. Section 2 judgment of a prospective redistricting plan would be educated guesswork at best, as reliable and relevant data is unavailable to evaluate future election results under the proposed boundaries. Election history and data from races held under former plans with different demographic and geographic makeups could be the only guide for a court to utilize while making its prospective determination of whether a Section 2 violation would occur.

In Thornburg v. Gingles, 478 U.S. 30 (1986), the Court stated that

> [t]he essence of a §2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.

Gingles at 47.

A Section 2 case, therefore, is a test of an existing situation against the social and historic context. With a court drawn plan, there is no "existing" situation with which to gauge the result of the implementation of the plan. See, De Grandy v. Wetherell, TCA 92-40015-WS, at 14 (N.D. Fla. May 29, 1992).

The Court further noted in Gingles that Section 2 had been amended to reflect, inter alia, the "right questions" that should be brought in a Section 2 lawsuit. Specifically

> [t]he 'right' question as the Report emphasizes repeatedly, is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' [cite omitted]
>
> In order to answer this question, a court must assess the impact of the contested structure or practice on minority electorial opportunities 'on the basis of objective factors.' [Cite omitted] [Emphasis added]

Gingles, 478 U.S. at 44.

The Three-Judge Court quoting portions of the above-cited language likewise stated that

> [i]t is important to remember ... that §2 involves a challenge to the effects or intent of a specific plan and the crucial aspect of the proceeding is the determination of liability. Gingles, 478 U.S. at 44 (quoting Senate Report at 27). [Emphasis in original]

SRAC Appendix 41.

Obviously, as the Three-Judge Court found

> ... a §2 plaintiff is attacking an existing practice and a plan being challenged under §5 must be advocated .... [Emphasis in original]

SRAC Appendix 41.

No party defended the existing plans, nor suggested the continued use of these plans. All parties were in agreement that demographic changes documented by the 1990 census dictated redistricting. Given that agreement by the parties, the application of Section 2 to the existing plan was moot.

The Court then had to determine if it would choose a plan from the various plans submitted by each party or fashion its own interim plan. In doing the latter, the Court took into consideration the appropriate Section 2 factors.

Under Section 2 criteria, the only true test of the Court drawn redistricting plans could occur after elections have been held and a new action is brought in Federal District Court. The right of these parties, or other non-parties, to exercise the option of post election litigation challenging the new plans on a Section 2 basis is not prejudiced by the lower court's Order.

In fact as the Three-Judge Court found, if it had

> ... completely graft[ed] the requirements of Section 2 into Section 5, the court would impair the duality of remedies currently afforded aggrieved parties under principles of res judicata or separation of powers.

SRAC Appendix 42.

II.

THE THREE JUDGE COURT APPLIED THE STANDARDS OF SECTION 2 OF THE VOTING RIGHTS ACT TO THE COURT ORDERED RE-DISTRICTING PLANS.

Faced with the task of redistricting the State House, State Senate and Congress, the Court did not ignore Section 2 in the drawing of these plans. Although a total adoption of the tests and requirements of Section 2 was not made, the standards of Section 2 were utilized in formulating the plans drafted by the Court. The Court in fact stated that "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of §2". SRAC Appendix 38. The Court went on to state that

> ... since it would be anomalous for this court to adopt a plan which immediately lends itself to an attack under §2, our analysis should ensure that the threshold requirements of a §2 action cannot be established under the adopted plan.

SRAC Appendix 45.

In Gingles, the United States Supreme Court addressed the requirements of the revised Section 2 standards. The Gingles case arose in the context of a lawsuit regarding the multimember redistricting [1] plan drawn for the North Carolina State Senate. The Supreme Court held that Plaintiffs bringing a Section 2 case must be able to meet all parts of a three-fold threshold test. The minority group had to be:

> ... sufficiently large and geographically compact to constitute a majority in a single member district ... the minority group must be able to show that it is politically cohesive ... [and] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances ... usually to defeat the minority's preferred candidate.

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[1] In the present case the Court redistricted already existing single member districts. The South Carolina House has been elected from single-member districts since 1974, and the South Carolina Senate since 1984.

Gingles at 50-51.

Each element must be present in order for the suit to be maintained. See, McNeil v. Springfield Park Dist., 851 F.2d. 937 (7th Cir. 1988) cert. den, 490 U.S. 1031 (1989); Monroe v. City of Woodville, 881 F.2d. 1327 (5th Cir. 1989) mod. 897 F.2d 763 (5th Cir. 1990), cert. den. 911 S.Ct. 71 (1990). If this threshold has been met, however, the Court

> ... is to consider the 'totality of the circumstances' and to determine, based 'upon a searching practical evaluation of the "past and present reality," '[cite omitted] whether the political process is equally open to minority voters. '"This determination is peculiarly dependent upon the facts of each case"' [cites omitted] ... and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms. [Cite omitted].

Gingles, at 79.

As a guideline for implementing a Section 2 review, this Court in Gingles cited the Senate Report findings of the typical relevant factors in a Section 2

case. The cited list includes such factors as the history of voting related discrimination, the extent of racial polarization in voting, utilization by the state of voting practices that increase the opportunity for discrimination, exclusion of minorities from candidate slating, the extent to which minorities bear the effects of past discrimination, the use of overt or subtle racial appeals in political campaigns, and the extent to which minorities had won election to public office. Gingles, at 44-45. The Senate Report also emphasized, though, that the list was not exhaustive nor did any particular group of factors have to be proven. Gingles, at 45.

Of these factors the SRAC Appellants admit that

> SRAC and the Burton plaintiffs submitted substantial evidence of the factors deemed probative of minority vote dilution identified in Thornburg v. Gingles, 478 U.S. 30, 37, 45 (1986), and the Senate Report that accompanied the 1982 amendment of Section 2, to wit:

> (1) that blacks were geographically compact; [fn. cite omitted] (2) that blacks were politically cohesive; (3) that voting was racially polarized; (4) that there was a history of official discrimination in the state that touched the rights of blacks to participate in the electoral process; [fn. cite omitted] (5) the depressed socioeconomic status of minorities; [fn. cite omitted] (6) the extent to which minorities had been elected in congressional and legislative contests; [fn. cite omitted] and (7) the use of voting practices, such as a majority vote requirement for primary elections, that may enhance the opportunity for discrimination against the minority group.

SRAC Jurisdictional Statement 5-6.

They also state that they presented testimony as to political cohesiveness and racial block voting. [2] SRAC Jurisdictional Statement 6. See also, Order, SRAC Appendix 55-56.

The Appellants, therefore, presented Section 2 testimony and evidence to the

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[2] It was stipulated that there was evidence of racial political voting in South Carolina since 1984. SRAC Appendix 56.

Court and the Court utilized this information in the drawing of its plans.

III.

THE THREE-JUDGE COURT ORDERED REDISTRICTING PLANS COMPLY WITH THE SECTION 2 REMEDY.

There is no bright line test as to what constitutes a Section 2 remedy in every case; therefore; the appropriate Section 2 remedy must be decided case by case. Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1989). A Section 2 remedy must be formulated to address and alleviate the problems proven in each case. In Jordan v. Winter, 604 F. Supp. 807, 813 (N.D. Miss. 1984) aff'd 469 U.S. 1002 (1984) the Court on remand stated that

> [i]n devising a plan to replace our prior plan for the impending election, we recognized the obligation to: (1) achieve the least possible deviation from the one person, one vote ideal, [cite omitted] (2) design a plan that is not racially discriminatory in either purpose or effect, [cite omitted] and (3) adhere to the state's policies except to the

> extent such policies are violative of either the Constitution or the Voting Rights Act [cite omitted].

And in U.S. v. Dallas County Commission., 850 F.2d 1433, 1437-38 (11th Cir. 1988), reh. den. 858 F.2d 746 (11th Cir. 1988), cert. den. 490 U.S. 1030 (1989) the Court stated that

> '[i]t is clear that any proposal to remedy a Section 2 violation must itself conform with Section 2.' Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987) (citing Edge v. Sumter County School District, 775 F.2d 1509, 1510 (11th Cir. 1985). This principle coincides with the legislative intent that when devising election plans to remedy Section 2 violations, federal courts 'should exercise ... traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.' S.Rep. No. 417 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Adm. News 177, 208.

The Three-Judge Court's plan meets the criteria set out above for remedying a Section 2 violation. The Court went to

great lengths to conform its plan as nearly as possible to the one person, one vote criteria, allowing for variations only insofar as to accommodate relevant and appropriate state policy. [3] Specifically the Court found that its plan for the House had a total deviation of 1.98 percent, a de minimis deviation, "therefore, the constitutional requirement of one man, one vote implicit in the Fourteenth Amendment is satisfied." SRAC Appendix 72. The Court further found that the plan was not retrogressive, as it created twenty-three (23) districts with a majority black voting age population as opposed to twenty (20) black voting age population districts under the 1981 plan when drawn. A total of twenty-eight (28) districts with black total population majorities are included in the Court

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[3] That consideration did not apply to Congressional Districts where the Court, following mathematical exactness as a criteria, arrived at a zero percent deviation. SRAC Appendix 17, 81-82.

drawn House plan, as opposed to the twenty-six (26) districts drawn in 1981 and the twenty-four (24) which existed under the 1990 census. SRAC Appendix 71-72. The Three-Judge Court stated it "looked to the voting age population as the measure of opportunity to elect the candidate of one's choice". SRAC Appendix 48. Voting age population is the same standard utilized in other cases in establishing a remedy for a Section 2 violation. See, McNeil, supra at 945; Romero v. City of Pomona, 665 F.Supp. 853, 864 (C.D. Cal. 1987) aff'd 883 F.2d 1418 (9th Cir. 1989).

A Section 2 remedy does not impose an affirmative duty to maximize the number of minority districts. As was noted in Watkins v. Mabus, 771 F.Supp. 789, 806 (S.D. Miss. 1991) aff'd in part, vac in part 112 S.Ct. 412 (1992)

> [i]t is doubtful whether Gingles held, ... that the amended Voting Rights §2 requires that states go beyond the requirement of non-dis-

> crimination in order to create as many non-white majority districts as possible. See, e.g., Jeffers v. Clinton, 730 F.Supp. 196, 217 (E.D. Ark. 1989) (three judge court), aff'd mem., 111 S.Ct. 662 (1991) ('We are not holding that law requires the creation of any particular number of majority-black districts.')

See also, State of Mississippi v. U.S., 490 F.Supp. 569, 582 (DDC 1979) aff'd mem 444 U.S. 1050 (1980).

The Three-Judge Court stated that it was

> ... guided by the decision in Jeffers v. Clinton, 730 F.Supp. 196, 205 (E.D. Ark. 1989), aff'd, 111 S.Ct. 662 (1991):
>
> > We agree that Thornburg and Smith cannot be automatically applied to the single member context. Dilution may be much more obvious in a case like Smith, where a potential majority of black voters was submerged in a two-member district. But the basic principle is the same. If lines are drawn that limit the number of majority-black single-member districts, and reasonably compact and con-

tiguous majority-black districts could have been drawn, and if racial cohesiveness in voting is so great that, as a practical matter, black voters' preferences for black candidates are frustrated by this system of apportionment, the outlines of a section 2 theory are made out.

Therefore, with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind, we have analyzed the proposed plans as well as the plans we adopt today based on the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard set forth in Beer and City of Lockhart; 2) the extent to which reasonable compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; 5)

> the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina. The Senate factors may be applied to the extent that they aid the court in its determination of these factors. This approach allows the court to formulate a plan which is consistent not only with the provisions of § 5, but insures that the court's plan will not violate the threshold requirements for liability under §2.

SRAC Appendix 45-47. See also, Wilson v. Eu, 823 P.2d 545, 565 (Cal. 1992).

The SRAC Appellants and Governor Campbell on Cross-Appeal assert that their plan should have been the measuring standard for the Court's plan. SRAC Jurisdictional Statement 20, Campbell Jurisdictional Statement 19. However, the Court detailed the problems with the plans presented by the parties as: excessively cutting county lines

and disregarding communities of interest, pitting political party incumbents against each other, and drawing plans only with regard to race or political affiliation. SRAC Appendix 63-64, 74-78, 80, 85.

The plans presented by the Appellants appeared to be seeking proportional representation. Indeed the Court noted that the plan presented by the Republican Party for the House was

> ... an attempt to achieve proportional representation on the basis of race, a result specifically not dictated by any federal or state law.

SRAC Appendix 56. [4]

Of course, Section 2 does not authorize the goal of proportional representation and expressly states that

> [n]othing in this section establishes a right to have members of a protected class elected in num-

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[4] The Republican Party is not an Appellant in this case, however, the drafter of the Cross-Appellant Governor's plans and the Republican Party's plans was the same individual. SRAC Appendix 78, fn 75.

> bers equal to their proportion in the population.

42 U.S.C. §1973.

The Court concluded that it was

> ... satisfied that its plan satisfies the requirements of the Voting Rights Act. The court's plan strikes the proper balance between the various interests arising in this type of proceeding, including equality of population in districts, racial fairness, and maintenance of the state's political subdivisions and communities of interest.

SRAC Appendix 79 [5] See also, SRAC Appendix 75. The Court specifically stated it had "... reviewed the Court's plan and conclude[d] that it contains no obvious violation of §2." SRAC Appendix 76.

The plan created by the Three-Judge Court, therefore, complied with a Section 2 remedy. Although the Three-Judge Court stated it was not obliged to conduct an indepth Section 2 review, it proceeded to in

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[5] This same indepth review was also followed by the Court for the Senate and Congress. SRAC Appendix 58-70, 79-85.

fact allow Section 2 testimony as to the Gingles listed factors and incorporated these findings in its subsequent plans.

IV

THE THREE-JUDGE COURT CORRECTLY INCORPORATED APPROPRIATE STATE POLICY IN DRAWING THE COURT ORDERED REDISTRICTING PLANS.

The Appellants argue that the Court should not have followed state policies in the drawing of its plans. SRAC Jurisdiction Statement 28, Campbell Jurisdictional Statement 22-25. However, that argument disregards the clear precedent of this Court that states that a court in implementing its own redistricting plans must follow state policy unless to follow that state policy would violate applicable constitutional or statutory standards or provisions. White v. Weiser, 412 U.S. 783, 794-795 (1973); Whitcomb v. Chavis, 403 U.S. 124, 160-161 (1971); Upham v. Seamon, 456 U.S. 37, 41-42 (1982). See also, Wesch v. Hunt, 785

F.Supp. 1491, 1498 (SD Ala. 1992) aff'd 112 S.Ct. 1926 (1992) pet. for cert. filed (U.S. June 5, 1992); Terrazas v. Slagle, 789 F.Supp. 828, 838 (W.D. Tex 1991) aff'd 66 U.S.L.W. 3870, 3878 (U.S. June 29, 1992); Emison v Growe, 782 F.Supp. 427, 447-448 (D. Minn. 1992) prob. juris. noted 112 S.Ct. 1557 (1992).

V.
SECTION 5 STANDARDS OF THE VOTING RIGHTS ACT WERE APPROPRIATELY APPLIED BY THE THREE-JUDGE COURT IN FASHIONING ITS COURT ORDERED REDISTRICTING PLANS.

The Appellants contend that the Court erroneously applied Section 5 standards as Section 5 only applies to the question of preclearance of a change by the courts or the Justice Department. SRAC Jurisdictional Statement 22-23. This argument disregards the years of precedent in reapportionment and redistricting cases which hold that Section 5 standards are the appropriate standards for a court to apply in fashioning

a plan. In McDaniel v. Sanchez, 452 U.S. 130 (1981) the court quoted from the 1975 Senate Committee Report on the bill that extended the life of the Voting Rights Act which stated that

> '... in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.' Senate Report, at 18-19. [fn. cite omitted]

Sanchez at 149.

CONCLUSION

For the foregoing reasons the Appeal of SRAC and the Cross-Appeal of Governor Campbell should be dismissed or in the alternative, the Three-Judge Court's Order below should be affirmed.

Respectfully submitted,

EDWIN E. EVANS
Chief Deputy Attorney General

TREVA G. ASHWORTH
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

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ROBERT J. SHEHEEN
Speaker of the House

STEPHEN P. BATES
Counsel to the Speaker

Post Office Box 11867
Columbia, South Carolina 29211
(803) 734-3125

APPENDIX

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Article I, §2 1

Article I, §2 of the United States Constitution

House of Representatives; how constituted; power of impeachment.

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and

excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersery four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the represen tation from any state, the executive authority thereof shall issue writs of election to

fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.